

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 493

J. L. ENOCHS, DISTRICT DIRECTOR OF INTERNAL
REVENUE, PETITIONER,

VS.

WILLIAMS PACKING & NAVIGATION CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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**IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE JACKSON DIVISION OF THE SOUTHERN
DISTRICT OF MISSISSIPPI AT JACKSON**

Civil Action No. 2690

WILLIAMS PACKING & NAVIGATION COMPANY, INC., Plaintiff,

vs.

**J. L. ENOCHS, DISTRICT DIRECTOR OF INTERNAL REVENUE,
Defendant**

COMPLAINT

Comes now Williams Packing & Navigation Company, Inc., and complains of J. L. Enochs in his official capacity as District Director of Internal Revenue for the State of Mississippi at Jackson, Mississippi, and respectfully shows unto court the following facts, to-wit:

I

The Williams Packing & Navigation Company, Inc. is a corporation organized and existing under the laws of the State of Louisiana and is qualified to do business in the State of Mississippi, and has an office in the City of Biloxi, Harrison County, Mississippi. (J. L. Enochs, the [fol. 3] defendant, is a duly selected and authorized Director of Internal Revenue for the State of Mississippi, and his address is Post Office Building, Jackson, Mississippi.

II

Jurisdiction in this case is founded on the existence of a Federal question and the amount in controversy. The action arises under Chapter 21 of Subtitle C of Internal Revenue Code of 1954, Federal Insurance Contributions Act, and Chapter 23 of Subtitle C of the Internal Revenue Code of 1954, Federal Unemployment Tax Act. The matter in controversy exclusive of interest and costs exceeds the sum of Three Thousand Dollars (\$3,000.00).

III

For a number of years the plaintiff has been engaged in the business of leasing boats from owners and operating same. That in the operation of said boats the plaintiff selects the captain of said boat and the captain selects the crew. The *captian* of the boat hires and fires the crew as he sees fit, without interference of the plaintiff. The captain of the boat determines when and where the boat shall fish; the hours that it shall fish; the days that it shall [fol. 4] fish and the days that it will return to port and the days that it will remain in port. The plaintiff has no control over the hours of work, the days of work, the places where the work is to be performed, or any of the operations of the boats in catching shrimp or oysters. The boats are operated on a share basis by the captain and the crew and the plaintiff. When a catch of shrimp or oysters is made, it is sold by the captain and members of the crew to plaintiff. The plaintiff pays the market price therefor. There is first deducted the fuel, groceries and trawl and gear maintenance and the balance is divided on a share basis as follows: One share to the boat, one share to the captain of the crew, and a share to each member of the crew.

IV

In the packing industry in Mississippi, Louisiana and Alabama, as well as in other states, this method has been universally accepted by the Bureau of Internal Revenue until lately as one of joint venture, and not the relationship of master and servant. Plaintiff alleges further that in addition to said relationship of joint venture being recog- [fol. 5] nized by the Bureau of Internal Revenue, it has also been recognized by the courts of the State of Mississippi; the United States District Court, and the Court of Appeals of Fifth Circuit, in the case of United States of America vs. Gulf Coast Shrimpers and Oystermen's Association, Louis L. Simmons, et al., reported in 236 Federal 2nd, Page 658. That in spite of the fact that the Bureau of Internal Revenue and the courts have recognized said relationship the Bureau of Internal Revenue has recently made demand upon plaintiff for a large sum of money represented by FICA taxes and FUTA taxes and interest, aggregating the sum of Forty-one Thousand Five Hundred Sixty-eight Dollars and Fifty-seven Cents (\$41,568.57), as

shown by a copy of a letter hereto attached, dated August 30, 1957, signed by Brownlee Harvey, Associate Chief, Appellate Division of the United States Treasury Department, marked Exhibit "A" and made a part of this complaint.

V

Plaintiff has operated as a corporation in the manner hereinabove described since September 15, 1944; that no [fol. 6] Social Security Taxes of FFTA taxes were demanded by the defendant until 1956. That thereafter conferences were had between representatives of plaintiff and the defendant wherein the plaintiff sought to show that the operation hereinabove described was one of joint venture and not of master and servant. That affidavits and briefs were submitted to the Appellate Division of the Bureau of Internal Revenue. Plaintiff alleges that no taxes of this nature have been collected or sought to be collected from any other boat operators such as plaintiff until recently. Plaintiff alleges that the act of the defendant in seeking at this date to subject it to FICA taxes and FUTA taxes plus interest in the total sum of \$41,568.57 is arbitrary, is capricious and unwarranted in law and without authority in law. That as a result of said underassessment Exhibit "A" to complaint herein the defendant is now in a position to distrain or levy upon the assets of the plaintiff for a large sum and if such distrain or levy is made the plaintiff will be forced to complete cessation of its fishing activities. It alleges that it cannot go into the tax court on this matter. It does not have sufficient funds to pay the underassessment as shown in Exhibit "A" and the collection of such tax would prove to be arbitrary, oppressive, destroy the business of the taxpayer, ruin it financially and inflict loss for which it would have no adequate remedy at law.

VI

Plaintiff alleges that it does not know the names of the crew members on the boats who fished during the period set out in the letter Exhibit "A". That it cannot collect from such crew members their share of the FICA taxes or FUTA taxes. Plaintiff is informed and believes and upon such information and belief avers that it cannot collect from the captain of the boats during the period described in Exhibit "A" their rightful contribution to FICA taxes

and FUTA taxes. Plaintiff alleges that the relationship of joint venture as now in existence and as was in existence during the period of years covered in Exhibit "A" were in existence long before the enactment of the Social Security Act and the Unemployment Tax Act. Plaintiff alleges that it relied upon regulations of the Treasury Department exempting the plaintiff from paying said taxes on the ground that the captain of the crew and crew members were independent contractors and that the venture was joint. Plaintiff alleges that the defendant delayed making any [fol. 8] demand on it for payment of the present taxes until the taxes and interest had accumulated against it to such an extent that it is unable to pay any part of them and that by reason of such delay de-rived plaintiff of the benefit it might have obtained by payment by the captain and members of the crew had it been liable for such taxes. Plaintiff therefore alleges that it has no plain, adequate or complete remedy at law; that if a distraint or levy is made for such taxes shown in Exhibit "A" the plaintiff will be forced into complete cessation of its fishing operations and its business will be ruined.

Wherefore, plaintiff prays that this its complaint be received and filed; that notice be given to the defendant to show cause on a day to be fixed by this court why a preliminary injunction shall not issue out of this court restraining the defendant from levying, distraining or collecting the taxes set out in Exhibit "A" hereto. Plaintiff prays that on a final hearing the preliminary injunction be made permanent. Plaintiff prays for such other further and general relief as in equity and good conscience it may be entitled to receive.

Williams Packing & Navigation Company, Inc. By:
 /s/ Elmer Williams, Its President. /s/ William
 [fol. 9] E. Logan, /s/ S. E. Morse, Attorneys at
 Law, 204 Hatten Building, Gulfport, Miss., Attor-
 neys for Plaintiff.

Duly sworn to by Elmer Williams.

Jurat omitted in printing.

[fol. 10]

EXHIBIT "A" TO COMPLAINT

**Appellate Division, Atlanta Region
3d Floor, Calder Building
1724 Third Avenue, N.
Birmingham 3, Alabama**

**ARC-Ap; ATL
Bir:HDC**

Aug 30 1957

**Williams Packing and Navigation Co., Inc.
Biloxi, Mississippi**

GENTLEMEN:

The Appellate Division has carefully considered your claims for abatement of employment taxes as listed below and the information furnished by your representatives.

Period	Tax	Interest
FICA		
1-1-53 to 3-31-53	\$1,562.07	\$300.17
4-1-53 to 6-30-53	1,865.66	330.41
7-1-53 to 9-30-53	1,900.60	322.71
10-1-53 to 12-31-53	1,078.14	158.65
1-1-54 to 3-31-54	1,786.74	236.05
4-1-54 to 6-30-54	1,422.25	166.61
7-1-54 to 9-30-54	2,240.20	228.85
10-1-54 to 12-31-54	1,622.42	141.39
1-1-55 to 3-31-55	1,791.25	129.25
[fols. 11-12]		
4-1-55 to 6-30-55	2,039.34	116.57
7-1-55 to 9-30-55	2,399.91	101.15
10-1-55 to 12-31-55	1,251.82	34.21
FUTA		
1-1-53 to 12-31-53	6,227.46	916.40
1-1-54 to 12-31-54	5,169.13	450.56
1-1-55 to 12-31-55	5,342.49	145.12

* These penalties were removed by the office of the District Director of Internal Revenue and were not in controversy before the Appellate Division.

It has been concluded that there is no overassessment of employment taxes and the cases will be returned to the District Director of Internal Revenue at Jackson, Mississippi, for proper disposition.

Copies of this letter are being mailed to your representatives, William E. Logan and Stanford E. Morse, Gulfport,

Mississippi, in accordance with the authority contained in the power of attorney executed by you and on file with the District Director of Internal Revenue at Jackson, Mississippi.

Very truly yours, (signed) Brownlee Harvey, Associate Chief, Appellate Division.

[fol. 13] IN UNITED STATES DISTRICT COURT

ORDER SETTING HEARING ON MOTION FOR PRELIMINARY INJUNCTION—September 5, 1957

This cause coming on this day on sworn complaint for a preliminary injunction against J. L. Enochs, District Director of Internal Revenue, Post Office Building, Jackson, Mississippi, to prevent the distraint and levy of FICA and FUTA taxes against the Williams Packing & Navigation Company, Inc., of Biloxi, Mississippi, and the court having heard and considered the same is of the opinion that a day and place should be fixed for hearing on the preliminary injunction, it is accordingly

Ordered, Adjudged and Decreed, that a hearing be had on the plaintiff's motion for preliminary injunction against J. L. Enochs, District Director of Internal Revenue, Post Office Building, Jackson, Mississippi, in the City of Jackson, Mississippi, on the 9th day of September, 1957, and the said J. L. Enochs may then and there show cause, if any, why said preliminary injunction should not issue, and the United States Marshal is hereby directed to serve a copy of the motion, order and complaint upon J. L. Enochs, [fol. 14] District Director of Internal Revenue, Post Office Building, Jackson, Mississippi, and make his return on said motion.

Ordered, Adjudged and Decreed, this 5th day of September, 1957.

/s/ S. C. Mize, U. S. District Judge.

IN UNITED STATES DISTRICT COURT

DECREE AND INJUNCTION—September 9, 1957

This cause coming on this day to be heard on this day fixed by the Court on September 5, 1957, on motion for a preliminary injunction, and the Court having heard and considered oral and documentary evidence is of the opinion that a preliminary injunction should issue out of this Court against J. L. Enochs, District Director of Internal Revenue, or his agents, servants or employees, to prevent the distraint and levy of the taxes, together with interest thereon, as shown in Exhibit A to the complaint,

It is accordingly ordered, adjudged and decreed that the defendant, J. L. Enochs, District Director of Internal Revenue, or his agents, servants or employees, be and they are hereby enjoined preliminarily until further order of [fols. 15-18] this Court from levying, distraining or collecting FICA taxes and FUTA taxes, together with interest thereon, as shown in Exhibit A to the complaint, for the period from January 1, 1953, through December 31, 1955.

It is further ordered, adjudged and decreed that bond as security for costs or damages in the sum of \$500 be given by plaintiff in favor of the defendant herein.

Ordered, Adjudged and Decreed this 9th day of September 1957.

/s/ S. C. Mize, United States District Judge.

[fol. 19] IN UNITED STATES DISTRICT COURT

ANSWER—FILED MAY 29, 1958

Comes now J. L. Enochs, District Director of Internal Revenue, by his attorney, Robert E. Hauberg, United States Attorney for the Southern District of Mississippi, and for his answer alleges:

I

Admits the allegations contained in paragraph I of the complaint.

II

Denies the allegations contained in paragraph II of the complaint.

III

Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph III of the complaint, and, therefore, denies each and every allegation of said paragraph.

IV

Denies the allegations contained in paragraph IV of [fol. 20] the complaint, except to allege that the opinion of the United States Court of Appeals for the Fifth Circuit in the case of *United States of America v. Gulf Coast Shrimpers and Oystermen's Association, et al*, 236 F.2d 658, speaks for itself, and admits that the Internal Revenue Service has recently made demand upon the plaintiff for F.I.A.C. taxes, F.U.T.A. taxes, and interest.

V

Denies the allegations contained in paragraph V of the complaint, except to admit that conferences have been had between representatives of plaintiff and defendant wherein the plaintiff sought to show that the operation described in the complaint was a joint venture and to admit that affidavits and briefs were submitted to the Appellate Division.

VI

Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VI of the complaint, except to deny that the defendant delayed making any demand on [fol. 21] it for payment of the present taxes until the taxes and interest had accumulated against plaintiff to such an extent that it is unable to pay any part of them and that by reason of such delay plaintiff was deprived of the benefit it might have obtained from payment by the captain and members of the crew had it been liable for such taxes, and to further deny that plaintiff has no plain, adequate, or complete remedy at law, and to deny that a distraint or

levy, if made, would force the plaintiff into complete cessation of its fishing operations and to deny that its business would be ruined.

Second Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Third Defense

That the Court lacks jurisdiction in this case as it is an action to enjoin the collection of taxes, which is specifically prohibited by Section 7421 of the Internal Revenue Code of 1954.

Wherefore, defendant prays that this action be dismissed [fols. 22-53] and costs taxed to the plaintiff.

/s/ Robert E. Hauberg, United States Attorney.

[fol. 54] PLAINTIFF'S EXHIBIT #1

LEON HALL was thereupon called as a witness and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Nickman:

Q. Mr. Hall, what is your full name?

A. Leon David Hall.

Q. What is your address?

A. 205 Front Beach, Ocean Springs.

Q. Is that in Mississippi?

A. Yes.

Q. Are you related in any way to Elmer Williams?

A. Yes, I married his daughter.

Q. What is your present occupation?

A. I work for the DeJean Packing Company, in the Production Department.

[fol. 55] Q. Could you please tell us, Mr. Hall, just what the nature of your duties is in connection with that production department?

A. Sure. Seeing that all the machinery is taken care of and seeing that the men do their work properly and are trained properly, and seeing that the shrimp are canned in the manner we like them canned, as far as quality and that type thing.

Q. How long have you occupied this particular position?

A. For about a year, I guess.

Q. During that period have you occupied any other position of business? Have you had any other position of business during the same time?

A. I am not quite clear on that question.

Q. I will restate my question. During the past year you state you have been Plant Manager of the Plant, is that correct?

A. Production Manager, yes.

Q. Production Manager. During this same period of time has that occupied all of your time, or do you have some other position of business of any kind?

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U

[fol. 56] A. As far the De Jean Packing Company, that's all I do, for them, but I do have some private things I do.

Q. What private interests do you have?

A. I don't know what depth you are reaching for. I have a grocery store.

Q. Is it your grocery store?

A. Yes.

Q. Do you own it?

A. Jointly with my wife, yes.

Q. What type of provisions are sold in this store, is it a general grocery store?

A. Yes, a general corner grocery store, just like all the Pop-and-Mom stores.

Q. During the past year have you spent any time there?

A. Very little.

Q. Who has run the store during the past year?

A. My brother.

Q. Does he have an interest in the business too?

A. Quite a keen interest, yes.

Q. Does he have a financial interest, does he own part of it?

A. No.

[fol. 57] Q. Does he draw a salary?

A. Yes.

Q. Does your wife perform any managerial activities of the store?

A. No.

Q. Has she ever?

A. No.

Q. Prior to the past year what was your occupation?

A. Well, it is kind of a varied thing.

Q. Just tell us whatever you may have done.

A. Well, I believe I came with the Company about eight years ago.

Q. When you say Company, what Company do you mean?

A. The De Jean Packing Company.

Q. You came with De Jean Packing Company eight years ago?

A. Yes.

Q. In what capacity?

A. Pretty well as a laborer in the warehouse.

Q. In the warehouse. What type of activity was performed in this warehouse?

[fol. 58] Stacking cases on trucks, labelling and receiving the goods out of the packing room, general warehouse work.

Q. Shipping and storage, is that it?

A. Storage, labeling and shipping, yea.

Q. What type of things were shipped and what was stored?

A. Well, we only had the two type products at that time, shrimp and oysters.

Q. Shrimp and oysters were stored. Was this in boxes, crates, barrels, or just what form did it take?

A. Our business is packing. The De Jean Packing Company packs, so we received it in the warehouse at that time in crates, stacked it out into cartons as to lots, sizes, and so forth, and then we would maintain it in that particular position until the time we received some labeling instructions.

Q. When it was received in the warehouse, where was it received from?

A. From the packing department.

Q. These things that went into the warehouse were received from the packing department of DeJeans?

A. That's right.

[fol. 59] Q. Did the warehouse have anything other than completely processed seafood?

A. No.

Q. Does it have anything in connection with supplies or repairs for the boats?

A. No.

Q. Were you in charge of the warehouse?

A. No.

Q. Who was in charge?

A. At that time it was Ronald Cavaovich.

Q. Is he still with the organization?

A. No.

Q. How many other persons were in the warehouse doing the same thing you were?

A. It varied as to the need and the time of the year. At peaks there was eight or ten or us, and in slack periods some of us were off. That is kind of a hard question to answer directly.

Q. Did that occupy all of your time, Mr. Hall?

A. Yes, all of my—

Q. All of your working time?

A. Yes.

[fol. 60] Q. That was a full day's job?

A. That's right.

Q. And now you say you started in that particular job about eight years ago?

A. Yes.

Q. How long did you continue doing this laboring work in the warehouse, over what period of time, months, years, days or weeks?

A. It must have been a couple of years in that particular department, about two years.

Q. You would say about two years?

A. Yes.

Q. Now, after that did you have any further engagement or business arrangement with this organization?

A. Yes, they moved me into the packing room.

Q. Now, when you say "they", who do you mean by they?

A. Mr. Williams.

Q. Mr. Elmer Williams?

A. Yes.

Q. He moved you into the packing room?

A. Yes.

[fol. 61] Q. And the packing room is located where with reference to the warehouse?

A. Adjoining it.

Q. Adjoining the warehouse?

A. Yes. It is just a different department, adjoining it.

Q. What type of work did you do there?

A. Pretty well the same type. There we processed the shrimp and we graded them and packed them in the cans.

Q. Were you in an ordinary working capacity, or did you have some type of supervisory or foreman's authority?

A. No, I was in a working-capacity.

Q. Was there a foreman or Superintendent of that operation?

A. Not particularly, no. Most of our orders came down from Mr. Williams.

Q. Mr. Elmer Williams?

A. Yes.

Q. And how long did you continue in that particular capacity?

A. It must have been about three years.

[fol. 62] Q. About three years doing ordinary work in the packing house?

A. Right.

Q. During that time orders pretty much as far as the management was concerned came from Mr. Elmer Williams, is that right?

A. That's right.

Q. Now, after that three year period what was your next position with the organization?

A. I was moved out and put pretty well in charge of the raw products, in the picking shed, we call it. At that time we were picking by hand, hand labor, and it was my job to see that the shrimp were picked properly.

Q. When you say picked, Mr. Hall, are you speaking about the deveining and deheading?

A. Yes, that is what I mean.

Q. Was this a hand operation or a machine operation?

A. At that time it was a hand operation.

Q. And you were in charge of that operation, is that correct?

A. Well, I wasn't in charge. I was to oversee it and to try to get the work done properly.

[fol. 63] Q. Who arranged for you to move into that capacity?

A. Mr. Williams.

Q. And how long did you continue in that phase of the business?

A. That's just about where I have lodged.

Q. That's where you are now?

A. Yea.

Q. Still doing the same job?

A. Yes, sir, pretty well the same. We are doing it a little differently.

Q. You have machinery now for that activity?

A. That's right.

Q. Now, when did you first acquire this grocery store?

A. I opened the store, I believe in February 1946.

Q. Were you married at that time?

A. Yes.

Q. When did you get married, Mr. Hall?

A. I think around May of 1945.

Q. Between May 1945 and February 1946 were you engaged in any work?

A. Yes, I was in service.

[fol. 64] Q. You were married in May 1945 and opened the store in February 1946, what work were you doing between those two periods?

A. I was in the service.

Q. So when you were discharged you opened the store in 1946?

A. That's correct.

Q. Were you in the Army or Navy?

A. Army, Air Corps.

Q. Did you receive an honorable discharge?

A. Yes.

Q. Now, what was your cash position in February 1946?

By Mr. Morse: I am going to advise him not to answer the question, it not being relevant to the issues in this case and is a matter that is purely personal to him. I have admonished him. He can answer it if he wants to.

By Mr. Nickman: (Continuing)

Q. Did you buy this grocery store with your own funds?

By Mr. Morse: I am going to make the same objection [fol. 65] there.

By the Court: Objection Sustained.

By Mr. Nickman: (Continuing)

Q. Did you receive this grocery store as a gift from anyone?

By Mr. Morse: Same objection. It is not relevant to any issue in this case. (to witness) I have given you my advice, Mr. Hall. You can take my advice and let the Court pass on whether you answer it, or you can answer it, or you can answer if you want to. I am not telling you what to do, I am just objecting. (to counsel) The reason I am doing this, Mr. Nickman, they have investigated these people so many times, on income tax matters and otherwise.

By Mr. Nickman: You realize the purpose of this interrogation?

By Mr. Morse: I realize the purpose of it. You want to know if the money was advanced by Mr. Williams.

By Mr. Nickman: Precisely.

By the Court: Objection Sustained.

[fol. 66] By Mr. Nickman: (Continuing)

Q. Mr. Hall, we assume that if you do not answer you are not answering either upon the *advise* of your counsel, or upon your own election. Would you care to state whether you prefer to answer, and if not, why you refuse to answer?

A. I refuse to answer on the advice of counsel.

Q. You are not invoking the Fifth Amendment, are you?

A. Not yet.

Q. Now, since 1946, Mr. Hall, up to the present time, have you spent any portion of your time in or about your grocery store?

A. Yes.

Q. You have spent some time there?

A. Definitely.

Q. Can you tell us when your time was spent in the store, what years and what periods of time?

A. The best I remember it was about '46 to '50.

Q. Around '46 to '50 you were active in the store?

A. That's right.

Q. What percentage of your time was was spent in the store from '46 to '50?

[fol. 67] A. I was batting a thousand.

Q. Pardon me?

A. One hundred percent of it.

Q. A hundred percent of your time was spent in the store?

A. Yes.

Q. Anybody else in the store with you?

A. Yes, I had some hired help.

Q. Was your wife active in it at all?

A. No.

Q. I believe you said you and your wife owned the store, is that right?

A. That's right.

Q. Is that a partnership?

A. No. Actually my wife and I own the property, and as far as the business itself she wasn't actually active in it whatsoever.

Q. Did you do, during the period of '46 to '50 any degree of business with fishermen or Captains?

A. Yes, just as I—

Q. You sold groceries to them?

A. Right.

[fol. 68] Q. Did you have any special arrangement relative to the payment of the groceries by the fishermen or Captains?

A. Nothing special, no?

Q. Did you deal with members of the public, with housewives when they came in to buy groceries?

A. Yes.

Q. When they came in to buy groceries did they pay when they took the groceries?

A. Some did and some didn't.

Q. You mean you had open credit accounts with members of the public? When people took groceries out didn't you expect to get paid for them?

A. I was running a business. I can't understand what you mean.

By Mr. Morse: He means did you extend credit or sell for cash?

By the Witness: I did both.

By Mr. Nickman: (Continuing)

Q. You did cash and credit?

A. Right.

Q. Did you do a credit business with the fishermen and Captains?

[fol. 69] A. Yes, just like I did with the others, some on credit and some paid cash.

Q. When the fishermen obtain groceries by credit did you have some customary procedure when they took the groceries out and didn't pay? What records were kept by you or by them?

A. Well, I have a pretty well complete record as to who paid and who doesn't pay.

Q. What kind of records are they?

A. They are sufficient. I would have to take you up and show you, actually.

Q. Are they individual accounts for individual fishermen, or just how do you keep them? How do you keep these records for people who take groceries out on credit?

By Mr. Morse: I believe to shorten this and get it down, Mr. Nickman, if I might suggest this. I don't believe he understands what you are driving at, and that is in relation to the boats operated by Williams Packing & Navigation Company. Is that correct?

By Mr. Nickman: That is substantially what I have in mind.

[fol. 70] By Mr. Nickman: (Continuing)

Q. How you handle it, whether it is cash or credit and how they pay and your records of same?

A. Well, it was handled both ways, some of them paid cash and some paid when they came in off the trips, and some of them left the money in the office here, and it was sent to me.

Q. Did you know in any particular case whether you were going to be paid cash or whether it was going to be credit transaction? Say we have three or four Captains come in at one time, How do you decide which ones are going to pay cash and which ones get credit?

A. Well, I didn't decide. It was just like the housewives, I began to know which ones would want them on credit and which ones would pay.

Q. Well, did you automatically give credit, if the fellow said "This is on credit. I am not going to pay", or did you have to decide which ones to give credit? Or did you just give credit to anyone?

A. No, I wouldn't give credit to anyone.

Q. Then how did you decide which one to give credit to?

[fol. 71] A. I was fortunate. I didn't have to make that decision. My account losses were very good.

Q. Who decided where you would give credit and where you would collect cash?

A. I made that decision.

Q. You mean you didn't talk to anybody else about it?

A. No.

Q. Where did you obtain your grocery supplies from?

A. Campbell Grocery Company, Mobile, H. T. Cottam Company, Gulfport, Armour and Swift in Gulfport, United Cash Grocery, Gulfport, and there was a Frering Grocery out of New Orleans.

Q. What type merchandise do they sell?

A. General groceries, canned goods.

Q. You ordered these supplies?

A. I did.

Q. You personally ordered them?

A. Yes.

Q. How did you order, by mail or by telephone?

A. Usually a salesman came around.

[fol. 72] Q. How did you pay for these groceries?

A. Either by cash or check.

Q. Was it your check when they were paid by check?

A. Right.

Q. Was it always your check if you paid by check?

A. Right.

Q. Did you have occasion to obtain any bank loans in connection with the operation of this business?

A. Yes, I borrowed money from time to time.

Q. For this grocery business?

A. Yes.

Q. Did you sign a note?

A. I signed a note with one man one time.

Q. You mean you only had one case where you signed a note?

By Mr. Morse: You mean you endorsed a note.

By Mr. Nickman: (Continuing)

Q. You mean you endorsed a note, or somebody endorsed a note for you?

A. I didn't get your question.

Q. Did you endorse somebody else's note, or did you have somebody endorse your note?

[fol. 73] A. I have had people endorse my notes.

Q. Could you tell me who endorsed your notes?

A. I don't think it is necessary to tell that.

Q. Well, let me ask you this. Did Elmer Williams endorse any of your notes?

By Mr. Morse: I object to that. It is not relevant to any of the issues in the case. I am going to advise you that you don't have to answer it unless you want to, or unless the Judge requires you to answer it.

By the Witness: I refuse to answer on the advice of my attorney. In fact, you might put that in, I bought a lot of bread from Smith Bakeries.

By the Court: Objection Sustained.

By Mr. Nickman: (Continuing)

Q. Now, Mr. Hall, coming back to the plant, have you spent any time during the period you have been associated with the organization, on the docks?

A. Yes, repairing the docks and receiving shrimp out of the boats.

Q. Just what was your capacity in connection with receiving shrimp out of the boats?

A. I would go out and take ice out of this tank here. [fol. 74] It overflows with ice and you have to get that ice out before the shrimp will come in on the conveyor. Come over here and I will show you. (counsel goes to window and observes tanks outside the building.)

Q. Now, where is the tank?

A. You see that tank where the conveyor goes down there? The shrimp would come into the tank and they have a lot of ice in them. We have a paddle there that pushes that ice back.

By Mr. Morse: You might identify what you are showing Mr. Nickman there, so that the record might reflect it.

By the Witness: (Continuing)

A. This tank you are looking at is a shrimp washing tank.

Q. Where is that tank?

A. That is the last piece of machinery you see in this line, with the conveyor above it. It goes down into the boat.

Q. You don't mean the chute?

A. No. 'way out.

Q. Below that electric light?

A. That's right.

[fol. 75] Q. That is a tank?

A. That is a shrimp wash tank.

Q. Where does the ice come into the picture?

A. The ice is coming out of the boats with the shrimp.

Q. On to that conveyor?

A. Yes, and dropping into that tank.

Q. Now, what function do you perform in connection with that operation?

A. When the shrimp is not flowing into the packing lines properly I have got to find out why, and I find in most instances that is the trouble and I have to correct that by taking the ice out so that the shrimp can flow freely in.

Q. How long have you had any interest or activity in connection with that particular operation?

A. This is closely connected with seeing that the shrimp are processed properly.

Q. That is part of the plant operation?

A. Yes.

Q. How, in that connection, what contact have you had with the Captains or the crew coming in with the catch?

A. Well, they usually come in and check their shrimp in and I give them a slip.

[fol. 76] Q. Check it where?

A. In the plant, at the scale.

Q. Are you at the scale when they bring them in?

A. Yes.

Q. And you give them a slip, or they give you a slip?

A. They come in and check it. We weigh it together.

Q. You weigh it together?

A. Yes, sir.

Q. And you give them a slip showing the weight?

A. I give them a slip showing the size of the shrimp and how many that comes into the plant.

Q. And by the size of the shrimp, you mean the count, is that correct?

A. Yes.

Q. And the slip shows the count and the weight, is that what it shows?

A. That's right.

Q. What else does the slip show. Has it got anybody's name on it?

A. It usually has the name of the boat.

Q. Who puts the name of the boat on it?

A. I usually do that.

[fol. 77] You write the name of the boat on it?

A. Yes.

Q. What conversations do you have with the Captain when he comes in with the catch?

A. "Where have you been, what you got", you know, the normal things. "How is the weather", and that sort of thing.

Q. Now you have just given us the procedure, at least primarily, as to the disposition of shrimp. Is it the same procedure in respect to oysters?

A. No.

Q. Then what is the procedure as to oysters?

A. As far as my duties are concerned, it is pretty well the same. The oysters are unloaded on the other side, and they come up through a washer and across an inspection belt and were loaded into cars. They were taken down and steamed and the meat taken out, and then I would meet with the Captain and weigh his meat.

Q. After the meat was taken out?

A. That's right.

Q. Now, where was the shucking done?

A. At the proper place in the plant.

[fol. 78] Q. The shucking was done inside the plant?

A. That's right.

Q. The whole oysters that are brought in on the trawler, how do they get into the plant when the boat docks?

A. I said that's where my duties begin, when the oysters come up through a conveyor, through a washer, across an inspection belt and drop into these little cars that take them into the steam box.

Q. And there are people inside the place that do the shucking, is that correct?

A. Yes.

Q. Are you present during any part of this operation from the movement of the oysters into the steam bath until the time it gets into the hands of the shucker. Do you have any connection with that operation?

A. I am very present, yes.

Q. What do you do?

A. I see that they move in properly and keep the people busy inside.

Q. Do you give a slip on that particular transaction after the meat is taken out and measured?

A. Yes.

[fol. 79] Q. When the oyster meat is removed from the shell how is it measured?

A. Weighed.

Q. And after the weight is determined you then issue a slip to the Captain, of the weight, is that correct?

A. That's right.

Q. Is there anything else on this slip besides the weight?

A. No.

Q. Nothing as to the size of quality of the oysters?

A. No.

Q. Only the name of the boat?

A. Right.

Q. Is the name of the Captain on it?

A. We never do put it down, because we just give it to the Captain.

Q. You are the one that hands the slip to the Captain, is that correct?

A. Generally speaking, yes.

Q. Now, during the times when you have had the unloading of the shrimp, or the oysters, as you have just described, have you ever had contact with individual crew members, instead of the Captains?

[fol. 80] A. There has been times when the Captain would designate the crew to unload his boats, yes.

Q. And you would give the slip to the crew member, is that correct?

A. That's right.

Q. Do you have discussions, and have you had discussions, since you have been connected with this organization, with Elmer Williams regarding your activities?

A. I guess you would call it discussions, because I get all my instructions pretty well from him on how to run the plant.

Q. Now, do you order any supplies of any kind in connection with the work you do as they may be needed?

A. Yes, we have to order cans and labels, and brushes.

Q. Do you do that ordering?

A. I do some of it.

Q. Do you order directly or how do you handle that? Do you pick up the phone and call for cans and labels, or how do you handle that?

A. If it is urgent I would do that.

Q. Who do you call?

[fol. 81] A. Turner Supply Company.

Q. You call the supply house direct, is that correct?

A. Yes, as a rule though I just have the driver go in and get a load of cans, and the labels are usually handled by Mr. Sewell. We just tell him we are short on labels and he will have the labels come in.

Q. Do you have any contact with Lucius Freiburger in connection with the performance of your duties?

A. Some.

Q. Have there been any disputes between you and the Captains and the Captains and the organization so far as you know concerning the weight or delivery of the catch?

A. I would say there has been, yes.

Q. What has been the nature of those disputes or disagreements?

A. Well, there was an awful lot as to the quality of the shrimp.

Q. Suppose you tell us about them, Mr. Hall?

A. I don't remember any specific instance.

Q. What has been the general nature of these disagreement?

A. Well, as you know, we have had Government inspection for years, and the Government inspector would probably find some shrimp along the line that was a little too old to be canned, and then at that time I would get the Captain of the boat and get together with him and at times we have had to argue just a little bit about them, or give him back his shrimp to do something else with them.

Q. Would that be also connected with the weight, how much credit they were going to get on the weight, or what?

A. It would naturally. It wouldn't have anything to do with the weight slip I gave him because I gave him a weight slip according to the shrimp received, but I couldn't receive bad shrimp.

Q. You mean you screened it out?

A. That's right.

Q. What happened to that?

A. Some cases I didn't know what happened to them. The Captain would take them and dispose of them. In some cases they were sold, and some cases I know they were dumped.

Q. Now, these disagreements with some of these Captains, when did they take place. Was that before or after the slip was issued?

[fol. 83] A. That would be before.

Q. Before the slip was issued?

A. Yes.

Q. Do any of your activities, Mr. Hall, relate to the handling of trash fish?

A. Yes, just the same as they do in shrimp and oysters.

Q. Are trash fish weighed the same way as oysters and shrimp? Are they handled on a weight basis?

A. That's right.

Q. What connection do you have with the ice or the ice plants?

A. I have none.

Q. You have no connection with the ice plant?

A. No.

Q. No connection with the ice crushing operation?

A. No.

Q. Have you been asked by a fisherman, or have you suggested to the fisherman any arrangement about the securing of ice?

A. No.

Q. Do you have any connection with the fuel pumps?

[fols. 84-100] A. No.

Q. Have you ever had?

A. No.

Q. During the period that you have been associated with this organization, or since the time of your marriage to Miss Williams, have you owned a fishing trawler or had an interest in a fishing trawler?

A. No.

Q. Have you had any discussion at any time since you have been associated with the organization, with fishermen

or Captains relating to anything other than the bringing in of seafood to this plant?

A. Not other than just general conversation.

Q. Nothing other than ordinary social conversation?

A. No.

Q. Nothing of any kind of a business nature?

A. No.

By Mr. Nickman: That's all.

(Witness excused)

[fol. 101] COLLOQUY BETWEEN COURT AND COUNSEL

By Mr. Nickman: I should like to make this preliminary comment at this point. Although the Order and Decree that was entered by this Court on September 9, 1957, recites the fact that the Court had heard and considered oral and documentary evidence in issuing the preliminary injunction, we should like the record to reflect the fact that no oral argument, no documentary evidence was actually submitted or heard, and no argument was made or briefs filed. We, therefore, ask the Court at this time to note on the record a corrective amendment or corrective recital in this particular regard.

Now, before passing on to a consideration of what this case involves, I think—

By the Court: With reference to that, you say you want me to make a statement as to what happened?

[fol. 102] By Mr. Nickman: We wanted to point out to the Court, as it is our obligation to do, that there has been some error or clerical mistake that the Court be given an opportunity to have the record reflect such correction. Now, the order that was apparently prepared I assume by counsel for Your Honor to sign—

By the Court: There was more than that. The representative of the Government of the United States Attorney's office appeared upon notice being given when the restraining order was granted, and the matter was discussed in the pre-trial conference as to what the facts and the issues were; and after that appearance, then I granted first, I believe—I don't recall whether the preliminary restraining order was granted prior to the pre-

liminary injunction—Do you have the file there? Do you recall? Was the preliminary restraining order granted—?

By Mr. Nickman: I think the understanding that had been originally had by the Department was that the Government for the purposes of getting the matter to issue was to agree to the issuance of the temporary restraining order as distinct from any preliminary injunction. However, due, shall we say, to some misunderstanding the Government agreed, as we understand it, summarily to the entry of a preliminary injunction. Now, my—

By the Court: I was going to come to that, because they did agree to it in this particular case because of what had transpired prior thereto. And I might state further for the record, while I am speaking for the record now, that at the June term, 1938, of this Court, this case was called for trial, and at that time by consent of the parties, the Government and the plaintiff, the case was continued with the thought in mind that agreed stipulation of facts could be had between the parties, and that there were more than one case involved; and it was thought by all parties that probably agreement could be made as to what the facts were, and my information was from some one of the attorneys—I think from both the plaintiff and the Government's attorneys—that a proposed stipulation was prepared soon after the June term, probably in July, and forwarded to Washington to see if they would agree to it, and that was held in abeyance for a long, long time [fol. 104] because I frequently called upon counsel about the case so that I could arrange my docket for the entire district to give the parties a trial in this case if they could reach an agreed statement of fact, and of they could not then to put the case to trial. So they could not agree upon the facts of the case, and then it was that counsel of plaintiff appeared some time before Christmas and asked that I set this case for trial, which I did do, notifying the United States District Attorney and counsel for plaintiff that the case was set for trial on this date.

By Mr. Nickman: May I just make this comment. What I had specific reference to was that the order and decree entered by this Court which appears to have been filed

on September 9, 1957, makes this recital, and not having been present I am not aware of what actually happened, although it was my understanding—

By the Court: Have I substantially stated what happened, Mr. Holmes?

By Mr. Holmes: This matter was presented to Your Honor in chambers in Jackson, and the U. S. Attorney's office, either me or Mr. Hauberg, one of us, had talked to Mr. Richard Roberts in the Department of Justice in [fol. 105-110] Washington. He had told us to be at the hearing on the question of the issuance of a temporary restraining order and not to object to the issuance, either should we consent to it, but just tell the Court we didn't object to the issuance of the temporary restraining order in this matter at that time; and therefore the temporary restraining order was issued at that time we made that statement. I believe I made it to the Court in chambers, and we were directly instructed by the Department in Washington not to object to the restraining order in this case, which was the first one filed at that time, and to later take such position as they saw fit.

By the Court: I will accept that statement as being correct as to what happened.

[fol. 111] ELMER WILLIAMS, called as a witness and having been duly sworn, testified as follows:

Direct examination.

By Mr. Morse:

Q. Your name is Elmer Williams?

A. That's right.

Q. How old are you, Elmer?

A. Sixty. I'll be sixty-one in March.

[fol. 112] Q. Where were you born and raised?

A. Biloxi.

Q. What education have you had?

A. I didn't go through the eighth grade. I went to the eighth grade, but I didn't go through it.

Q. Was that in the Biloxi school?

A. In the Biloxi schools, yes.

Q. When did you start in the fishing business?

A. I started after I came out of school.

Q. About how old were you then?

A. Well, I opened oysters before and after school, and then when I come out of school I opened oysters and then I begun running on boats.

Q. Do you have a brother?

A. Yes, sir.

Q. What is his official name?

A. Carroll E. Williams, Jr.

Q. He is better known as Peck Williams?

A. Peck Williams, that's right.

Q. Is Peck working now or is he not?

A. No.

Q. Is he in physical condition to work?

A. No, sir, he's in bad shape. His legs.

[fol. 113] Q. Is he in condition to come up in this courtroom?

A. No.

Q. You have a wife?

A. Yes.

Q. What is her name?

A. Cornelia Williams.

Q. And Peck has a wife. What is her name?

A. Ophelia Williams.

Q. Now, is there a partnership known as the DeJean Packing Company?

A. That's right.

Q. And who composes that?

A. Elmer Williams, Carroll E. Williams, Ophelia Williams and Cornelia Williams.

Q. You and your wife and Peck and his wife?

A. That's right.

Q. Is there anybody else that is in that partnership?

A. No, sir.

Q. Did you and your wife and Peck and his wife—and when I'm using "Peck" throughout this testimony, he is

known by me by that name and it's difficult for me to call him Carroll. And you know him by Peck?

[fol. 114] That's right.

Q. Did you and your wife and Peck and his wife form a partnership agreement?

A. That's right.

Q. Was that agreement in writing, Mr. Williams?

A. Yes.

Q. Look at this original document and tell us what it is.

A. You mean to read it?

Q. No, you can look at it. If you can, identify it from looking at it; but if you need to read it, then read it. Look at the signatures.

A. That signature is all right.

Q. To what?

A. To the agreement.

Q. Partnership agreement?

A. Partnership agreement.

Q. That is the DeJean partnership agreement?

A. That is the DeJean, yes, sir.

By Mr. Morse: We desire to offer in evidence the original partnership agreement and substitute a copy.

By the Court: Very well. You have a carbon copy?

[fol. 115] By Mr. Morse: I told Mr. Nickman I don't have another one in my files; I'll furnish him a photostatic copy.

By the Court: You might let the photostatic copy² be marked as the exhibit and retain the original for observation by Mr. Nickman if he desires to see it.

By Mr. Morse: Very well.

(Same received in evidence and marked as Plaintiff's Exhibit 3, which exhibit is copied here below.)

PLAINTIFF'S EXHIBIT #3**Partner Agreement**

**STATE OF MISSISSIPPI,
County of Harrison:**

Know All Men by These Presents: That, we, the undersigned Elmer Williams, Carroll Williams, Jr., Mrs. Cornelius Williams and Mrs. Ophelia Williams, hereby agree and bind ourselves as follows:

1. At the present time there is in existence DeJean Packing Company, a corporation organized and existing under the laws of the State of Mississippi, and domiciled in Biloxi, Harrison County, Mississippi.

[fol. 116] 2. Steps are now being taken to dissolve the DeJean Packing Company, a Mississippi corporation. Proceedings in Chancery Court of Harrison County, Mississippi, are now pending, looking to that end, and it is contemplated a decree dissolving the corporation will be obtained at the November 1943 Term of Chancery Court of Harrison County, Mississippi, or as soon thereafter as practicable.

3. The entire capital stock in DeJean Packing Company, a Mississippi Corporation, is now held and owned as follows:

- 25% by Elmer Williams**
- 25% by Carroll Williams, Jr.**
- 25% by Mrs. Cornelius Williams**
- 25% by Mrs. Ophelia Williams**

4. Upon the dissolution of DeJean Packing Company, a Mississippi corporation, and surrender of its charter, the decree of dissolution will vest in the stockholders of record at the time of the filing of the petition for dissolution in the Chancery Court of Harrison County, Mississippi, the entire assets of the said corporation, as tenants in common, in the proportion of their respective ownership of stock in said corporation. Regardless of said decree, the proportions of the interest of the parties to this agreement shall be as hereinafter stated.

[fol. 117]

5. Hereafter the business formerly operated and conducted by the DeJean Packing Company, a Mississippi Corporation, shall be operated and conducted by Elmer Williams, Carroll Williams, Jr., Mrs. Cornelius Williams and Mrs. Ophelia Williams, as equal co-partners under a firm name and style to be agreed upon, the title to all property real, personal and mixed, of the said corporation, to be owned by the parties mentioned in this paragraph, as co-tenants and owners, each owning an undivided one-fourth thereof.

6. Likewise, the parties hereto agree (as between themselves) each to be liable for 25% of the valid debts of the corporation now in existence, or which may be hereafter created or incurred in the course of the partnership business. The net profits, if any, arising or accruing from the partnership business, or to the partnership shall be divided in the proportion of one-fourth to each partner.

7. In the event of the death or withdrawal of one or more of the partners in the business herein described, the partnership business as operated under this agreement shall continue and be so operated for at least two years from and after such death or withdrawal of any such partner. It is further agreed that if any partner withdraws from the partnership, the remaining partners shall have the right to purchase the interest of said withdrawing partner in the said partnership business at the then book value thereof. It is understood further that in the event of the death of any partner that the heirs, executors, administrators or assigns of said deceased partner, shall be obligated to first offer the interest in the partnership of such deceased partner to the remaining partners at the then book value, before otherwise selling or disposing of the same. This provision, it is understood and agreed, shall be binding upon the heirs, executors, administrators and assigns of the parties hereto.

8. The consideration for this agreement is the sum of \$1.00, cash in hand paid by each of the parties hereto, to the other, receipt whereof is hereby acknowledged, and other valuable considerations, including the mutual benefits and advantages to flow to each party hereto, from and by the performance of this agreement.

[fol. 119] Witness our signatures this 15th day of September, 1943.

/s/ Carroll Williams, Jr., /s/ Mrs. Ophelia Williams,
/s/ Elmer Williams, /s/ Mrs. Cornelius Williams.

Q. Has that partnership operated since the original agreement as a partnership?

A. Yes, sir.

Q. What is that partnership been engaged in doing?

A. Buying canned shrimp, buying canned oysters and selling canned shrimp and canned oysters.

Q. Did you buy raw shrimp?

A. No, sir.

Q. Would you buy raw shrimp from Williams—

A. Williams Packing and Navigation Company.

Q. So then you did buy raw shrimp?

A. Yes, we bought them from Williams.

By Mr. Nickman: We object to counsel's continuing to lead the witness. We think he ought to be able to answer the questions because of his position with the company.

[fol. 120] By the Court: Don't lead the witness.

Q. Did the DeJean buy raw shrimp from Williams Packing and Navigation Company, Inc., the plaintiff in this case?

A. Did they buy them?

Q. Yes, purchase them from them.

A. Yes.

Q. And after they purchased them, what did DeJean do?

A. They canned them.

Q. And sold them, did they?

A. That's right.

Q. Now, do you know of the Williams Packing and Navigation Company?

A. Yes.

Q. What is it?

A. It is a corporation formed under the laws of Louisiana.

Q. Is it qualified to do business in Mississippi?

A. Yes, sir.

Q. And has it been doing business in Mississippi?

A. Been doing business since 1944.

Q. Now, tell the Court what the Williams Packing and Navigation Company does with reference to its activities, [fol. 121] Mr. Williams.

A. Well, the Williams Packing and Navigation Company leases the boats from DeJean Packing Company and operated the boats.

Q. How do you mean operates the boats?

A. I mean the boats bring in the shrimp to Williams, and then they are sold to DeJean.

Q. Now then, Williams Packing and Navigation Company, insofar as the boats are concerned, leases, as I understand it, from DeJean practically all the boats. Is that right?

A. That's right.

Q. Then in turn how does the Williams Packing and Navigation Company let boat captains have those boats? Just describe the method and what is done by the Williams Packing and Navigation Company in letting the boat captains have those boats, Mr. Williams.

A. Well, they come down—

Q. When you say "they"—?

A. I mean the captains.

Q. All right.

[fol. 122] A. Captains come down and say they would like to go out on one of our boats, one of Williams boats, go out.

Q. And if he is acceptable, what do you do?

A. Tell them it's all right.

Q. Who is the one that generally does that for Williams Packing and Navigation Company?

A. Me.

Q. What is then done? Is the boat turned over to him or not?

A. That's right, if he's acceptable.

Q. After the boat is turned over to him, who selects the crew members?

A. The captain.

Q. Does the Williams Packing Company or you or any employee of Williams Packing and Navigation Company have anything to do with the selection of the crew members?

A. None whatsoever.

Q. Now, Mr. Williams, who selects the time when the boat will be out, places where it will go, how long it will stay, what amount does it catch,—who makes the decision? [fol. 123] The captain, because I know we don't have nothing to do with it. Williams don't have nothing to do with it.

Q. When you say "we," who are you meaning?

A. Williams.

Q. Now, has the Williams Packing and Navigation Company had anything to say to—And by them, I mean you or any employees of Williams Packing and Navigation Co.—to the crew members or the captain about when, where, how long to fish, how long to stay out?

A. None. The fact of the matter is half the time Williams don't even know who the crew members are.

Q. Now, after the captain is selected how—I believe you stated the captain selects the crew. Is that right?

A. Yes.

Q. Who makes the decision about the groceries and the fuel and the ice?

A. The captain makes it.

Q. When you say he makes the decision, does he order them or not? Does he order the groceries?

[fol. 124] A. He orders them most of the time.

Q. Now, when they are ordered, to whom are they charged, either the oil, fuel, groceries or ice?

A. It's charged to Williams.

Q. It is charged to Williams?

A. Williams Packing and Navigation Company.

Q. When the crew members go out, how long do they usually stay, have they been staying, since you got the big boats?

A. Well, the big boats averages maybe eight or ten days. They stay out about that time.

Q. Now, do you of your own knowledge know whether some of them fish at night time and some at day time?

A. I hear they do.

Q. Have you been out there on the water and seen them fish at night?

A. I've seen them from the beach fishing at night.

Q. Who makes the decision as to whether or not they will fish in the day time or night?

A. They make that themselves.

Q. When you say "they"—?

A. I mean the fishermen.

[fol. 125] Q. The captain and the crew members?

A. The captain and crew members make the decision.

Q. Now, as to when they come in, do you have any—Williams Packing and Navigation Company—have any supervision as to when they will come in?

A. None whatsoever.

Q. When they do come in with a catch, just describe to the Court what is done with that catch of shrimp or oysters, as the case may be.

A. Well, it's shared and shared alike. The captain gets a share, and each crew member and the boat.

Q. What about the rig? Describe the rig.

A. The rig is what we call trawls and we get a share for the trawls.

Q. When you say "we get"—?

A. I mean Williams gets that share.

Q. Frequently are any of those trawls paid for?

A. Well, we have about, I'd say, 24 or 25 boats, and I'd say there's only about 4 or 5 paid for the rigs.

Q. After a rig is paid for, who has the equity in that rig?

A. The boat and the crew and the captain.

Q. And in event the captain gives up the boat or the crewmen give up, what is done about their equity in the rig?

[fol. 126] A. Well, they generally value the trawls and they come up there to the office and get their money for their part of it.

Q. And has that been done?

A. Yes, sir.

Q. By Williams Packing and Navigation Company?

A. Yes, sir.

Q. When you select a boat captain, what is the basis of your selection with reference to navigation and reputation as to fishing and so forth?

A. Well, I was born and raised right down there amongst them and I pretty well know.

Q. You know whether they are good navigators in these waters?

A. I think I do, I think I got a good idea as to some of 'em.

Q. As to their reputation about being good fishermen, do you know whether they are regarded generally as being good fishermen?

A. Yes, I do.

Q. Now, this suit covers the years 1953, '54, and '55, Mr. Williams. State to the Court if during those years the boats were being operated by captains and the crew members in the manner that you have just described.

A. Exactly the same.

Q. Now when the captain and the crew members bring their catch to the wharf, to whom do they sell it?

A. Sell it to Williams.

Q. That is Williams Packing and Navigation Company?

A. Williams Packing and Navigation Company.

Q. And then what is that known as? Raw Product?

A. The raw shrimp or the oysters.

Q. There's little difference in the manner in which oysters and shrimp are shared—I mean in the method.

A. Well, the captain gets a bonus on the oysters and they get a little bonus on the shrimp too.

Q. I meant this, Mr. Williams: On shrimp, how are they paid? By what measurement are they paid for?

A. By the barrel.

Q. What measurement is paid to the captain and crew members for oysters?

A. That is pay by the can.

Q. What do you mean "by the can"?

[fol. 128] A. Well, the meat.

Q. By the yield?

A. The yield on the oysters.

Q. Is that after they are steamed or not?

A. That's after they are steamed and weighed.

Q. And then that depends upon the number of oysters to the can. Is that correct?

A. That's right.—No, it just depends upon the weight.

Q. Weight of the can?

A. Weight of the meat.

Q. Weight of the oysters. Now do you remember the

time of the trial here, Mr. Williams, of the Gulf Coast Shrimpers and Oystermens Association case where several were convicted?

A. I heard about it, but I don't think I ever attended any of it.

Q. You know the occasion?

A. Yes.

Q. Prior to the time of that conviction, how had the boat captains and crew members been operating as compared with how they are operating now?

A. Same way as they are operating now.

[fol. 129] Q. Now, prior to the conviction, who fixed the price of shrimp?

A. The union.

Q. Did the factories or you have anything to do with that?

A. No, sir.

Q. Now, after the conviction and on up until now, how have the prices been fixed, or on what basis were prices paid for shrimp?

By Mr. Nickman: We object to that. Mr. Morse states a conclusion for the witness, that the prices were fixed. I think the witness ought to be able to testify to these matters. This is a different proceeding.

By the Court: I'll let you reframe the question.

By Mr. Morse: Which question did you object to? The last one?

By Mr. Nickman: That's right.

Q. All right. Since the conviction, what has Williams Packing and Navigation Company paid for shrimp? On what basis has it paid for shrimp?

A. I'd say on supply and demand.

[fol. 130] Q. Is it paid on any price fixing by anyone?

A. No, sir.

Q. Now, since the conviction and since they have stopped fixing prices, have the boats operated in any manner, boats and crewmen, operated in any manner different from what they did when they had the old union, Mr. Williams?

A. Never have and they haven't been any different since I run on a boat 30 years ago, 35 years ago. It's been the same operation.

Q. Have you ever tried or told any captain or crew mem-

ber or have any of your employees to your knowledge ever told any captain or crew member when to go out fishing and when to return?

A. No, sir.

Q. Have you ever told any of them whether to fish for shrimp or whether to fish for oysters?

A. No, sir.

Q. Now, Mr. Williams, have your boats on frequent occasions—I'm talking about your boats, the boats that Williams leased—Have they on occasions sold to third parties? [fol. 131] A. Yes, sir.

Q. In what places?

A. They have sold down at the mouth of the river, Empire, Gulfport, sold at Bayou LeBatre, Apalachicola, Florida.

Q. Did they have any instructions from you or anybody at Williams to sell at those places?

A. No, sir.

Q. When they would sell at those places you mentioned, what would the captain do with respect to putting groceries, fuel and ice on the boats?

A. Well, he'd take the money he sold the shrimp for and buy—refuel and get some more groceries.

Q. And when the boat finally returned to Biloxi, was an accounting had as between the captain and the Williams Packing and Navigation Company?

A. Most of the time. Sometimes Williams wouldn't get anything.

Q. Did Williams ever tell them to go to Empire, to go to Bayou LeBatre, to go to Apalachicola?

A. No, sir.

Q. When they purchased ice and fuel and groceries at [fol. 132] those places you mentioned, did Williams direct them from whom to purchase those commodities?

A. No, sir.

Q. During the existence of Williams Packing and Navigation Company has any boat captain or crew member insofar as you know paid social security through the Williams Packing and Navigation Company?

A. No, sir, not as I know of.

Q. Insofar as you know, have they ever asked you—

By Mr. Nickman: We object. Counsel stated at the preliminary hearing that he was going to insist on the best evidence. This is not the best evidence of what counsel intends now to adduce.

By the Court: I will overrule the objection to that question. He is proving now what they didn't do, so I will overrule the objection to that question.

Q. Insofar as you know, has the Williams Packing and Navigation Company paid any social security taxes on any crewman or captain as an employee of Williams Packing and Navigation Company?

A. No, sir.

[fol. 133] Now, until after this suit—

By Mr. Morse: And I assume Your Honor will take judicial knowledge of U. S. versus Gulf Coast Shrimpers and Oystermens case because you tried it.

By the Court: Will take judicial knowledge of the time it was tried and the result of it.

By Mr. Morse: Very well.

Q. Prior to the case of the United States of America versus Gulf Coast Shrimpers and Oystermens Association, Louis Simmons, et al, reported in 236 Fed. 2nd, Page 658, had any demand been made by the Internal Revenue Service or any member of the Internal Revenue Service or of the U. S. or of the Social Security Service for the payment of Social Security taxes on captains and members of the crew?

A. No, sir.

Q. About when, if you can recall, was it that demand was first made on Williams Packing and Navigation Company that social security—that they were going to seek social security taxes from Williams?

A. I'm not so sure but about two years ago.

[fol. 134] Q. Would be 1956?

A. Somewhere along there. I'm not sure.

Q. Who was the man that came into your office to make that examination?

A. I just don't—

Q. Was it somebody from the Internal Revenue Department?

A. Oh, yes.

Q. Prior to his coming and making demand for these taxes through channels, had any demand ever been made, from the time social security taxes first started, on Williams Packing and Navigation Company to pay social security taxes on captains and crew members?

A. Never have been.

Q. Now, the Bureau of Internal Revenue made demand of \$41,568.57 on Williams for social security taxes it claims were due by the captains and crew members. Is that correct?

A. That's right.

Q. Now, do you know in a general way the assets of—what assets Williams Packing & Navigation Company has?

A. I don't know.

[fol. 135] Q. I say in a general way.

A. It's in bad shape, I can tell you that.

Q. Let me ask you this question: Had a levy of \$41,767.57 plus interest and plus taxes been levied and attempted to be collected against Williams, what would have resulted in the status of the Williams Packing and Navigation Company, if you know.

A. It would put us out of business.

Q. In 1956 when this demand was made on the Williams Packing and Navigation Company, were they still operating in the same manner that they operated before?

A. Same way.

Q. With the captain and with the crew members?

A. The same way.

Q. Now, you have described to us when the captain and crew members bring in a load of shrimp or oysters, and when there is a profit I believe you state that that is shared after deducting expenses. Is that right?

A. That's right.

Q. Suppose they bring in what is called a broker or they [fol. 136] don't catch enough to pay the expenses of fuel, groceries, and ice. What is done with reference to the loss there, Mr. Williams?

A. Well, if the same crew goes back again and they make another trip enabling them to pay that, they pay it. I mean, we take it out. Williams takes it out.

Q. Suppose they don't? Suppose the crew member leaves?

A. We just have to take that loss, and it's happened a lots and lots of times.

Q. Suppose the captain and the crew members leave?

A. We got to take that loss.

Q. By "we," whom to you mean?

A. Williams.

Q. Mr. Williams, I believe we brought out that now you are operating what we call large boats, vessels of about what size?

A. The biggest—I mean the biggest we operate is about 65 feet.

Q. Are those boats capable of going out and staying out for a number of days?

A. Oh, yes.

[fol. 137] Q. Can they take ice and go out in the Gulf proper?

A. Yes, they take their own ice.

Q. Now, about how long have those so-called big boats been in operation?

A. I guess about 5 years, 4 or 5 years.

Q. Before you had the big boats, Mr. Williams, how was the catch handled and brought in?

A. Well, we used to have what they call freight boats.

Q. Would those freight boats be owned by you or probably by somebody else, or how were they owned?

A. Both ways. We had independent freight boats and boats owned by ourselves.

Q. Describe to the Court how the freight boats were operated and how the catch was handled.

A. Well, the freight boats would pick up the shrimp from the catch boats.

Q. Now, the catch boats, were they usually large boats or small boats?

A. No, small boats.

Q. And they in turn would do what with the shrimp?

A. You mean the freight boats?

Q. No, the catch boats.

A. They'd unload them on the freight boat.

[fol. 138] Q. And what kind of receipt would they get for them?

A. They'd get a receipt for so many barrels or so many pounds of shrimp.

Q. The freight boats, were they large boats or not?

A. Pretty good size boats, but not as big as the boats we have now.

Q. Now, were the freight boats iced up?

A. Yes, they had ice.

Q. And were the catch boats iced?

A. No.

Q. Usually how was the catch handled, whether by day, or how was it handled by the catch boats when they sold to the freight boats?

A. Well, in the evening or twice a day they'd go and unload on the freight boat.

Q. Now, before you got to the motor boats, did you sail as a crew member or as a captain on any sailing vessels that fished for shrimp or oysters?

A. I went as a crew member.

Q. On—?

A. Sailboats.

Q. How long ago was that?

[fol. 139] A. That was, I guess, 40 years or more.

Q. Who selected you as a crew member?

A. The captain.

Q. How were you paid when you were operating on a sailboat?

A. The same way they are paid today, on a share basis, share alike.

Q. How was the captain paid?

A. Same thing.

Q. In other words, to your knowledge for 40 years this same operation has been conducted by packers and fishermen?

A. Same way.

Q. Who were you working for when you first started work?

A. I worked for a seafood company, I worked for Dunbar Dukate, I worked for Martin Fountain, and I think that's all.

By Mr. Morse: I think that's all, Your Honor.

By the Court: Take a 10 minute recess.

(Whereupon the Court recessed for ten minutes.)

After Recess

(Mr. Morse continues direct examination:)

[fol. 140] Q. Look at this picture. What does that represent?

A. That's an aerial photograph of our factory.

Q. Are boats there?

A. That's right.

Q. When you say "our factory," whose do you mean?

A. DeJean.

Q. And is the Williams Packing and Navigation Company, Inc., located on one of those plants there?

A. Right there. (indicating)

Q. Do they have offices in the same building?

A. Same building.

OFFERS IN EVIDENCE

By Mr. Morse: We offer that as a joint exhibit.

By the Court: Let it be marked.

(Same received in evidence and marked as Plaintiff's Exhibit 4, which exhibit is not copied here because upon order of the court the original exhibit will be sent up with this record.)

Q. Look at this one. See if you can tell what that is. Does that look like another aerial photograph?

A. It's an aerial photograph.

Q. Can you recognize the DeJean Plant in it or not?

[fol. 141] A. No, don't seem like I can recognize it.

Q. Looking at it again,

A. Yes, I was looking at it wrong. That's right.

Q. Is that another aerial photograph from a different angle? Of the plant?

A. Of the plant, that's right.

By Mr. Morse: I offer that as a joint exhibit.

(Same received in evidence and marked Plaintiff's Exhibit 5, which exhibit is not copied here because upon order of the Court the original exhibit will be sent up with this record.)

Q. Another photograph. What does that appear to be?

A. That's the warehouse.

Q. Is that a ground photograph of the warehouse?

A. Ground photograph.

Q. Taken from the ground.

A. The ground, yes.

By Mr. Morse: We offer that as a joint exhibit.

(Same received in evidence and marked Plaintiff's Exhibit 6, which exhibit is not copied here because upon order of the Court the original exhibit will be sent up with this record.)

[fol. 142] **Q. What is that I offer you?**

A. That is another ground photograph.

Q. Of what?

A. Of the warehouse.

Q. Of what company?

A. DeJean.

By Mr. Morse: We desire to offer that as a joint exhibit.

(Same received and marked as Plaintiff's Exhibit No. 7, which exhibit is not copied here because upon order of the Court the original exhibit will be sent up with this record.)

Cross-examination.

By Mr. Nickman:

Q. You were asked on direct examination whether or not you had anything to do or any way control or tell the men where or when to go shrimping or oystering, and your answer was no.

A. That's right.

Q. Now, on January 17, 1959, you were asked by me this question: "Who decides as to whether or not a particular [fol. 143] trawler will go shrimping or fishing or oystering?" and your answer was, "I do."

A. I corrected that.

Q. Are you changing your testimony?

A. I corrected that statement.

Q. Why did you correct it?

A. Because as I was going down the stairs——

Q. —what stairs?

A. —From the Judge's office, I knew I had made a mis-

take for this reason: that the fishermen dredging oysters in December come and told me that they were not going to dredge oysters.

Q. Are you speaking now, sir, about the general practice of the company or about this particular instance?

A. I'm talking about the general practice.

Q. You say the men told you they were not going to go oystering?

A. That's right.

Q. Did you also state that everyone was going oystering in Biloxi except the DeJean Packing Company?

A. I said this: If I remember correctly, I said this is the [fol. 144] second time that we haven't packed oysters since we been in business. One time the union wanted so much money for the oysters we stayed closed all season. And this year.

Q. I'm going to repeat my question. Didn't you testify that the DeJean Packing Company was the only company that was not going oystering?

A. I think all the rest of them has got their boats ready.

Q. Do you know whether they are or not?

A. No, I don't go around there.

Q. You don't know?

A. I know some of 'em are operating.

Q. Supposed you tell us which ones are operating.

A. Mavar is operating.

Q. Operating oysters?

A. They was. And CC Company.

Q. Were they or are they now?

A. I don't know.

Q. Then you don't know.

A. I said I do know they was. Right at the particular moment I don't know.

Q. Who else do you think *amay* be oystering?

[fol. 145] A. Charlie Weems is oystering. Weems Brothers.

Q. They are oystering?

A. They was.

Q. When?

A. Three or four weeks ago.

Q. For how long a period?

A. I don't know, I don't know that.

Q. Isn't it a fact, Mr. Williams, that oystering is now so bad because oysters are scarce and there aren't any oysters available? Isn't that a fact?

A. Our fishermen told us that before the reefs opened up. They didn't know if there was any oysters there or not.

Q. Did you inspect the reefs?

A. No, sir.

Q. Then you don't know whether that is so or not. Is that correct?

A. I don't know if there's any oysters, no, I couldn't answer that question.

Q. Would there be any point in the men going oystering if there weren't any oysters available?

A. I know there's boats bringing in oysters.

[fol. 146] A. In any quantity?

A. As much as 75 barrels to the boat.

Q. Would that be commercially profitable for your operation?

A. Not for ours.

Q. No. So, it doesn't make any difference whether the men did or did not go oystering since it wouldn't be commercially profitable for you. Now, you were also asked whether or not the men were at liberty to dispose of their catch at liberty, according to their own will, and your answer was, "No, we got those boats working for DeJean." Isn't that correct?

A. That's correct, but I meant—I corrected that statement because as I was going down the stairs Mr. Morse was on my side, and Mr. Logan and the other Morse boy there, and I hollered at them and I told them I had made a mistake because I know our boats have put out shrimp at Empire, we have some boats that's working for Gulfport, and they put out shrimp in Bayou LeBatre and Apalachicola, Florida, and I wanted to back and change my testimony, and Mr. Morse said it had been a long day [fol. 147] and he thought that—He knew he was tired and thought the judge was tired, so he said I could correct it at a later date.

Q. Now, Mr. Williams, you have been in this business most of your life, and you have been testifying this morning as to the manner and method of controlling this business, and two of the most important things in this case

are whether or not you control the men or whether or not you tell them what to do and where to go. Yet you say on the two most important things in the case you made a mistake or forgot. How can you explain, if you can explain it, how you could forget such a thing so important in this case?

A. I proved that with the statement I made.

Q. Well, now, you admit that after you made this statement that you do tell the men that they have got to bring this catch back to DeJean and that the men may not sell it elsewhere?

A. No, sir.

Q. And you admit then that you discussed this matter with Mr. Morse after the testimony was taken? Isn't that true?

[fol. 148] A. I wanted to go back in the court.

Q. But you did discuss it with Mr. Morse. Isn't that so?

A. I hollered at him and stopped him and Mr. Logan and George Morse.

Q. That was on a Friday?

By Mr. Morse: Saturday.

Q. Saturday.

A. Saturday.

Q. You made no attempt to return to the courtroom or bring to the reporter's attention or my attention until the following Monday, isn't that so?

A. I think I just explained that to you.

Q. Mr. Williams, I invite your attention to a photograph which is identified and marked Plaintiff's Exhibit No. 4. I ask you to look at that photograph and tell us whether or not there is any building in there which is exclusively devoted to any activities of the Williams Packing and Navigation Company.

A. All this line here is Williams.

Q. You mean there is a portion of that photograph that covers a building that is exclusively devoted to the activities of the Williams Packing and Navigation Company?

[fol. 149] That's where the shrimp and oysters all go.

Q. Where is this? You mean this dock belongs to the Williams Packing and Navigation Company? Is that your answer?

A. I don't say it belongs to them. We use it.

Q. My question is, is there any portion of that property exclusively and completely devoted to the activities of Williams Packing and Navigation Company?

A. This shed I showed you is used by Williams.

Q. Used by Williams, but also used by DeJean, is it not?

A. No, DeJean has no dealings there.

Q. Isn't the property all owned by the DeJean Packing Company?

A. Owned by DeJean, but this is used by Williams.

Q. But DeJean doesn't use any part of it?

A. Not this I'm showing you.

Q. Aren't you connected with the DeJean Packing Company?

A. I am.

Q. Do you go out on this property?

A. Yes.

Q. While you are acting for DeJean Packing Company you go out there, do you not?

[fol. 150] A. That's right.

Q. I also invite your attention to the fact that there appears to be on this photograph no sign of any kind. Is that correct?

A. No, there's no sign.

Q. Now, I show you two other photographs designated and received in evidence as Plaintiff's Exhibit No. 6 and No. 7. I ask you to look at both of those exhibits and tell us whether you see any identity of the name "Williams Packing and Navigation Company."

A. I do not.

By Mr. Morse: So we may shorten this, we agree that there is no sign on any of the buildings designating Williams Packing and Navigation Company as being located on this property, Your Honor, if that is the point of those photographs.

Q. Now, I invite your attention once again to Plaintiff's Exhibit No. 4 with particular reference to the rear building. Do you recall that this building had a sign posted on it reading during the time you had a freight boat [fol. 151] system that the fishermen were to return all of

the catch to the wharf if a freight boat was not available? Do you recall such a sign?

A. No.

Q. You never remember such a sign on that property?

A. No.

Q. One other question with reference to this operation. You also have a building here, do you not, which is devoted to boat buildings. Is that correct? The building of boats?

A. We used to build boats but we use it now for repairing.

Q. You use it for repairing. When you say you use it; who do you mean by "you"? Who does that mean?

A. Williams Packing and Navigation Co.

Q. You mean Williams Packing and Navigation Company does the repairing or the DeJean Packing Company?

A. Williams.

Q. Williams does the repairing?

A. No, DeJean does the repairing.

Q. You say DeJean does the repairing. Which building is it on here? Can you mark it?

A. I think it's this one here.

[fol. 152] Q. I hand you a pen and ask you to mark with an X the building devoted to boat building.

A. We are not building any boats.

Q. When you were building boats.

A. That looks like the building.

Q. Would you please put an X on that.

(Witness marks.)

Q. Now, which building is devoted to the processing. Put an X on that.

By Mr. Morse: Better put a Y or a Z on that.

By Mr. Nickman: Well, that's all right.

(Witness marks.)

Q. Now, you have an office. Is there one building or more than one building devoted to administrative or office work? Will you mark that?

A. Right here.

Q. What are these other building here in this cluster? Will you mark them?

(Witness marks.)

Q. Tell us what they do in those buildings.

A. Here's where we have the operations for the cat food.

Q. When you say "we", who do you mean by "we"?
[fol. 153] A. Williams.

Q. You mean the—

A. I mean DeJean Packing Co. packs the catfood. DeJean packs the shrimp.

Q. You say then this is the DeJean plant for cat food or is it the Williams plant?

A. It's the DeJean.

Q. What is the other building?

A. That is where the machines are picking shrimp.

Q. Whose operation is that?

A. DeJean.

Q. Which building is that? This one here?

A. This one.

Q. What is the tall building right next to that on the other side?

A. Might be Cruso's building as far as I know. Might be Bill Cruso.

Q. Suppose you take a look at one of the other photographs. Perhaps that may stimulate your memory as to what the buildings are. You have a warehouse here?

A. Yes.

[fol. 154] Q. Could that be a warehouse?

A. Where?

Q. This building right here.

A. No, here's our warehouse.

Q. Whose warehouse is that?

A. There it is right there.

Q. That is the DeJean warehouse?

A. Yes.

Q. Now, this building over here out near the wharf where the ships come in, what is that?

A. I think that is just a—I think that is our building.

Q. When you say "our"—

A. DeJean.

Q. All these building are DeJean's we have been talking about?

A. All the buildings, but here's where we unload the shrimp and oysters for Williams.

Q. But this entire area we have been talking about belongs to DeJean Packing Company. Isn't that correct?

A. That's right.

Q. These vessels are trawlers which are moored at the dock, are they part of the fleet?

[fol. 155] A. I guess they are, yes.

Q. You would recognize these as being vessels in the fleet that belong to the DeJean Packing Company, isn't that correct?

A. We have some independent boats there to.

Q. You have some independent boats?

A. Don't belong to us, some independent boats, yes, that works for Williams.

Q. Now, Mr. Williams, you testified that you and your brother and your respective wives entered into a partnership and this partnership was organized September of 1943. According to this partnership agreement it is stated that the DeJean Packing Company is being dissolved as a Mississippi corporation. Do you recall that? Do you recall that prior to the formation of this partnership there was a DeJean Packing Company which was a corporation? Do you recall that?

A. I don't remember.

Q. I'll invite your attention to Paragraph 2 of this partnership agreement and ask you to read that and see if that doesn't—

[fol. 156] A. Is this what the agreement says? (Witness reads same) What was the question again?

Q. The question was, prior to this partnership there was a DeJean Packing Company which was a Mississippi Corporation and my question was, do you recall that?

A. I don't recall it, but looking at this it must have been.

Q. Do you know or recall when the corporation was first started?

A. No, I don't recall it. I know we had to form the corporation to get the shrimp and oysters out of Louisiana. I know that much.

Q. Mr. Williams, I'm now talking about the DeJean Packing Company which this agreement states is a Mississippi corporation, not a Louisiana corporation.

A. I can't answer that because—

Q. You don't know?

A. As far as the book work is concerned, I don't know anything about it.

Q. Who would know anything about this agreement? Your name appears here, your brother's.

[fol. 157] A. Mr. Frieberger would know.

Q. Mr. Frieberger knows all about this?

A. Yes.

Q. You testified that the fishermen make *there* own arrangements, get their own ice and other items in such places as Apalachicola, Bayou LeBatre and such other places as you have mentioned. Now, you stated in connection with a deposition on January 20, 1959 which Mr. Morse took, page 22, you were asked this question: "What determines the condition under which that situation arises?" Now, the situation referred to was these dispositions of fish or these provisioning of the ships. Your answer: "When shrimp were running in that part of the country, the boats asked to go down to Apalachicola."

A. That's right.

Q. Why did they have to ask you to go to Apalachicola if they are running these boats themselves?

A. They said they were going to Apalachicola or they were going to Bayou LeBatre. Some of 'em went down the river.

[fol. 158] Mr. Williams, you stated that for many years you had been a crew man and had been engaged in this activity so far as the actual fishing was concerned. Do I understand that you have been doing that recently or you have abandoned doing that? When was the last time you were on a commercial fishing vessel?

A. I guess about 40 years ago.

Q. In other words, you don't do any of that now?

A. No, sir.

Q. Do I understand then that you have not been actually commercially fishing on a trawler yourself for 40 years?

A. That's about right.

Q. When these fishermen go out fishing, you wouldn't be in a position to tell them where fish are or fish are not, would you?

A. We don't intend to.

Q. You make no surveys of the waters, do you, in order to ascertain whether shrimp are located in one area or another area?

A. Williams never attempts to tell them anything like that, don't know.

[fol. 159] Q. The point is you don't know where the fish are yourself, do you?

A. No, sir.

Q. Only the fish know that?

A. That's right.

Q. Now, do you know Mr. Lucius Frieberger?

A. I do.

Q. Who is he?

A. He is our bookkeeper.

Q. When you say "our bookkeeper," who do you mean by "our"?

A. Williams and DeJean.

Q. He is the bookkeeper for the Williams Packing & Navigation Company and the DeJean Packing Company?

A. That's right.

Q. Is he on salary?

A. Yes, sir.

Q. Who pays him?

A. DeJean.

Q. Does he hold any position other than bookkeeper?

A. He holds a position with Williams. He's an officer [fol. 160] in Williams Packing and Navigation Company.

Q. Does he have anything to do with the operations of the business?

A. In what way?

Q. Other than bookkeeping.

A. We depend on his judgment in a lot of things.

Q. As to what?

A. Finances and things like that.

Q. Does he have anything to do with the activities of the fleet?

A. No.

Q. Does he have anything to do with the recruitment or discharge of the captains or the crew?

A. No, sir.

Q. Has nothing to do with the selection?

A. No, sir.

Q. Does he have anything to do with whether or not a vessel will or will not dispose of a catch?

A. No, sir.

Q. Does he have anything to do with the icing?

A. Unless the boat captain comes up there and asks him to order a load of ice. He might do that. That's all I know of.

[fol. 161] Do you have discussions with Mr. Frieberger from time to time about the business?

A. Naturally.

Q. What type of discussions do you have?

A. I just told you. Mostly finances.

Q. Mostly financing?

A. Yes.

Q. Is that with reference to banking transactions?

A. That's right.

Q. Does he keep you informed from time to time as to the financial condition of both companies?

A. He does.

Q. Does he also keep you advised as to the financial status of the companies with respect to their banking positions?

A. He does.

Q. Has he brought to your attention at least during the past seven years that the Williams Packing and Navigation Company has been having constant overdrafts at the bank?

A. He has.

Q. In connection with these overdrafts have you ever had any discussions with the bank?

[fol. 162] A. I leave that up to him.

Q. In other words, you haven't had any discussions with the bank?

A. I leave that up to Frieberger.

Q. Is your answer to that question yes or no?

A. No.

Q. Do you know whether or not the DeJean Packing Company or Williams Packing Company has any agreement or understanding with the bank with respect to these overdrafts?

A. I don't know that.

Q. Do you know Mr. Glenn L. Swetman?

A. I do.

Q. Do you know him in a business way?

A. We have been doing business with him since we been in business.

Q. What business?

A. Since DeJean and Williams Packing Company was organized.

Q. What business is Mr. Swetman in?

A. He's the cashier and vice-president of the Peoples Bank of Biloxi.

[fol. 163] Q. Is that the bank you deal with?

A. That's right.

Q. Do you know whether or not the DeJean Packing Company or the Williams Packing and Navigation Company has any Louisiana oyster leases?

A. You have to have them if you work oysters.

Q. You say you have to—

A. —You have to lease ground.

Q. Do you have the leases in your possession or in the offices?

A. I couldn't answer that. Mr. Frieberger would have to answer that.

Q. Are you aware of the fact that in Louisiana there are two types of fishing areas for oysters—one on a natural reef and one on the leased reef?

A. I do.

Q. And you say you have written leases with the State of Louisiana for lease areas?

A. You got to lease so much ground for so many boats. If you got ten boats, you got to lease so many acres of ground, send those boats in there.

Q. Mr. Williams, you recall having testified before the [fol. 164] United States grand jury on March 3, 1953, in connection with the anti-trust proceeding?

A. I know I testified.

Q. Do you recall having been asked by the grand jury what your occupation was?

A. I don't remember that.

Q. The question was asked you, "What is your occupation?" Your only answer was—

By Mr. Morse: Do you have another copy of that transcript? We'd like to see it at the same time.

By Mr. Nickman: This is not being offered in evidence. This is for impeachment purposes.

By Mr. Morse: I'd like to look at it along with you.

By the Court: I'll overrule the request and let him cross examine the witness, and after he has cross examined him I may require him to give you the minutes—

By Mr. Morse: —Just that portion of it.

By the Court: —That portion about which he examines the witness. Is that the minutes of the grand jury?

By Mr. Nickman: That is the transcript of the entire grand jury proceeding.

[fol. 165] By Mr. Morse: Who transcribed it?

By Mr. Nickman: That is the official transcript of the case.

By Mr. Morse: You say that, but that doesn't prove it.

By the Court: Very well gentlemen. Have a seat over there. I will assume that is a transcript of the grand jury proceeding if Mr. Nickman tells me it is.

By Mr. Nickman: That is an official transcript of the grand jury proceeding in the anti-trust case.

By the Court: Very well. I will let you cross examine about.

Q. You were asked the question, "what is your occupation?" Your answer was, "Partner in the DeJean Packing Co." Is that correct?

A. That is correct. That's what I am, a partner.

Q. That proceeding, since you were at the grand jury, involved only the activities of fishermen and matters related to so-called price and price controls. Not once in this grand jury minutes do you mention the fact that you were connected with the Williams Packing and Navigation Company. [fol. 166] Do you recall that?

A. I don't recall it.

Q. You don't recall you never told the grand jury you were connected with a Williams Packing & Navigation Co?

A. What year was that?

Q. This was 1953.

By the Court: To shorten this, Mr. Nickman, let me ask you, was the question asked him as to whether he was or not?

By Mr. Nickman: No, your Honor, but the point is—

By the Court: I don't think that is exactly fair cross examination if it wasn't asked him. I will let you ask him

any pertinent question you have with reference to his testimony.

By Mr. Nickman: I think it significant, Your Honor, that here was a criminal inquiry relative to matters dealing with fisherman and boats, yet there is no statement by Mr. Williams nor does he indicate himself as being in any other capacity except the DeJean Packing Company which is a processing company. And that is part of our case to [fol. 167] establish that these two organizations are tied up.

By the Court: I'm going to require you later on—I'm going to accept your word for it now that the question was never asked him as to whether he was or not, and if it is material, then I will require you at a later stage of the proceedings to give the copy or lend the copy to counsel on the other side. So with that, you may proceed.

Q. You were also asked this question: "Do you have radio equipment on your boats?" Your answer was, "Some of them". You were also asked, "Could you call those boats in if you wanted to?" And your answer was "Yes."

A. But we don't.

Q. The question is not whether you do, but whether you have the right to do so.

By Mr. Morse: —Or Could.—

By the Court: Very well, gentlemen, no argument about it. Ask the next question.

By Mr. Morse: I'd like to see that last question that he asked because I want to clarify it.

[fol. 168] By Mr. Nickman: I think you might have it if the Court so rules.

By the Court: I will require him to let you see that page.

By Mr. Morse: Just that question.

By the Court: I don't think a great deal of that testimony is material, because it would go too far off to try that lawsuit over again; but anything competent for impeachment purposes you may ask about, and if anything in the vicinity of it would clarify any testimony that might appear to be otherwise impeachment, he is entitled to offer that part of it.

Q. Mr. Williams, you have also connected with your organization a Mr. Sewell, is that correct?

A. That is correct.

Q. What is his capacity?

By Mr. Morse: When you designate the organization, I wish you would tell which one.

By Mr. Nickman: I think Mr. Williams should be required to answer which one.

A. He is a salesmanager for DeJean Packing Company.
[fol. 169] Q. What?

A. Sales manager.

Q. For the DeJean Packing Company?

A. Yes, he told you that the last time—

Q. Now, do you have any discussions with him?

A. I do.

Q. What are the nature of those discussions?

A. Well, generally sales, shipping out, things of that sort.

Q. Sales of what?

A. Canned shrimp and canned oysters.

Q. You discuss with him from time to time the kind of catch as to shrimp and oysters?

A. No, I don't discuss that with him.

Q. You don't discuss with him the type of oysters and shrimp that are being brought in?

A. I'm anxious to see him sell it after it's canned.

Q. Do you understand your answer is you never discuss with him the kind of fish or quality of the fish that are being brought in?

A. I don't know: Maybe sometimes I might talk about shrimp with him.

Q. What do you talk about?

[fol. 170] A. May be the size of the shrimp.

Q. Size of shrimp?

A. Size of shrimp.

Q. How about oysters?

A. No, have seldom.

Q. Don't you discuss with Mr. Sewell whether or not there is a demand in the market for oysters or for shrimp?

A. I just answered that. I said I discussed that with him, how are they moving, shrimp and the oysters.

Q. Doesn't his information convey to you whether or not shrimp or oysters ought or ought not to be caught?

A. No.

Q. What good is that information to you then?

A. I just ask him, that's all.

Q. When he tells you that there is a heavy demand in the market for shrimp, doesn't that mean anything to you?

A. I'm glad to hear it.

Q. Oh, you're just glad to hear it.

A. Glad to hear it.

[fol. 171] Q. Mr. Williams, you also have a plant that is engaged in the processing of cat food?

A. That's right.

Q. When did you start that operation?

A. We started that—tried to start it around I guess February—It was around April or March, somewhere along there. No, sooner than that because they struck us four months around there up until the first of May. We tried to start it and we had to stop.

Q. Do you mean April or May of 1958?

A. That's right.

Q. How did you come to get in the cat food business?

A. We worked six years on trying to get that company to come in here.

Q. How did you decide to go into it?

A. Because we think the shrimp and oyster business is—You have got to have something besides that.

Q. You mean there weren't enough shrimp and oysters around? Is that the point?

A. That's right. That's right.

Q. Now, in the preparation of cat food, what type of [fol. 172] ingredients go into it?

A. I don't know. They have a man that puts his own—makes his own formula.

Q. What does your organization do with regard to this cat food product?

A. We just pack it. They have a man that does all that.

By Mr. Morse: He is going far afield. This is dealing with cat food in '58 and '59, and the years in question—I have no objection to it, but—

By Mr. Nickman: Your Honor—

By Mr. Morse: Just a minute.

By the Court: One at the time.

By Mr. Morse: I can take care of myself with you now.

By the Court: State your objection.

By Mr. Morse: My objection is this: We are dealing with three years, '53, '54, and '55, not dealing with the other years '57 and '58. We have no objection to going into them, but it's going to unduly prolong the trial on the issue involved in the case.

By the Court: Well, I'll overrule the objection.

By Mr. Morse: Very well.

[fol. 173] Q. Does the DeJean Company or the Williams Packing & Navigation Company get or obtain any product which goes into this cat food?

A. DeJean Packing Company.

Q. What does it handle? What is the product?

A. Cereals and things of that sort. Williams handles the fish.

Q. Maybe I can help you with the answer. Isn't it a fact that trash fish is one of the items that go into cat food?

A. That's right.

Q. Does your organization handle trash fish?

A. Yes, I just told you they handled it.

Q. Is trash fish caught in this area in any quantity?

A. At times, certain times of the year.

Q. Have you ever indicated either directly or indirectly that the captains ought to go trash fishing?

A. No. They make their own mind up on that.

Q. Well, at certain times of the year isn't it a fact that your plant is set up either for oysters or shrimp or cat food?

A. Set up for both.

[fol. 174] Q. Set up for what?

A. Set up not for oysters, but for shrimp and cat food. It can work both at the same time.

Q. Work both?

A. Yes.

Q. And your plant can handle both in any quantity at any time? Is that your answer?

A. I don't say any quantity.

Q. Well, it can handle it in certain limited quantities?

A. That's right.

Q. Suppose you have a very large number of boats out

fishing and your plant cannot handle all of the catch, what happens to the part that your plant cannot handle?

A. We can generally handle it.

Q. You can handle every portion of every quantity—

A. That our boats catch.

Q. I say can your plant—?

A. Yes.

Q. —process—?

A. Yes.

Q. Do I understand then that your plant has never rejected at any time any catch that has been brought to the [fol. 175] docks?

A. Not as I know of.

Q. You have never rejected them?

A. Not as I know of.

Q. Isn't a fact that your organization disposes to third parties from time to time some of the catches?

A. Catches of what?

Q. Of any product.

A. Yes, at times we do.

Q. I thought you just said that you have never rejected any of them.

A. I said on fish, I don't remember. Fish.

Q. Has your organization taken all catches of oysters, shrimp and trash fish?

A. No, at times they go and unload somewhere else, some other factory, of fish or shrimp.

Q. Of shrimp or trash fish?

A. Not trash fish especially.

Q. What kind of fish?

A. Shrimp.

Q. You also said fish? What other fish?

A. That's all.

[fol. 176] Q. Just shrimp?

A. Shrimp, maybe oysters.

Q. Isn't it a fact that some of your vessels have taken trash fish and unloaded at Gulfport?

A. They're working steady down there.

Q. What was your answer?

A. It's some of our boats working steady down there at Gulfport.

Q. Then you have unloaded at other places besides your port, have you not?

A. Yes, I just said that.

Q. I didn't know you said that. Now, Mr. Williams, you testified that you don't know who the crewmen or on any of your vessels. Is that correct?

A. I don't know if I said I don't know the crewmen on any of them. I said there's a lot of them I don't know the crew members on.

Q. When you say you don't know, you mean you personally or your organization.

A. I mean the organization, Williams Packing and Navigation Company does not know, have any way of knowing the crew members.

[fol. 177] Q. When you say you don't know them, I want to get your answer straight for the record. You mean you don't know what they look like or you don't know their names?

A. I don't know their names, and I don't know what they look like half the time.

Q. Isn't it a fact the share slips show the names of crewmen?

A. I don't look at the share slips. That's handled by Mr. Frieberger.

Q. The reason you don't know is because you don't look at your records, isn't that so?

A. That's not part of my business, looking at the share slips.

Q. Mr. Williams, did the DeJean Packing Company suffer property loss during a hurricane approximately during the year 1947?

A. What is the question again?

(Counsel repeats question.)

A. They did.

Q. How was that property restored?

A. Had to be built back.

[fol. 178] Q. Who did it?

A. How do you mean who did it?

Q. Who did the work on that property restoring it back to its previous condition?

A. Well, you mean the contractors, or who you talking about?

Q. I mean who did the physical labor on that reconstruction job?

A. Some workers that we employed.

Q. Isn't it a fact that you had the fishermen help build the property back to its previous condition?

A. The fisherman never put in too much time on that property.

Q. Did they put in any time?

A. A little, but not too much.

Q. Did you pay them anything for it?

A. They got paid besides that.

Q. Who paid them?

A. They get paid for the fish that they keep when they're out there shrimping and stuff. They got well paid for that.

Q. Isn't it a fact, Mr. Williams, that the fishing trawlers [fol. 179] are required to be painted by the captains or the crew once a year?

A. No, sir.

Q. Isn't it a fact that that painting is actually done once a year?

A. We have a shipyard crew to do that painting.

Q. You mean the superstructure of the vessel is not painted by the captain and crew?

A. No, sir, unless they want to. If they did they got paid for it.

Q. You say they are paid for it?

A. I said if they did do it, they got paid for it.

Q. Who paid them?

A. The company paid them.

Q. DeJean or Williams?

A. Williams.

Q. Will that be shown on the books of the Williams Packing and Navigation Company?

A. I don't know.

Q. Will Mr. Frieberger know?

A. I don't know. He ought to know. Might know.

Q. Now, Mr. Williams, where do the fishermen usually obtain the groceries for these fishing trips?

[fol. 180] A. Well, if they are in here, in Biloxi, they obtain

them at Hall's Grocery. And if they're away from here, down the river, they get them any place they want to. Or if they're down to the east they get them any place they want them.

Q. Who owns Hall's Grocery Store?

A. My son-in-law, Leon Hall.

Q. Is he also connected with your organization?

A. He works there, yes, sir.

Q. He works there?

A. Yes.

Q. Who does he works for, which company?

A. DeJean Packing Company.

Q. Now, you say the fishermen usually buy their groceries at this grocery store. Can you tell us why?

A. I guess they buy them there because they are just as cheap as anywhere else. We don't only have our boats that buy; we have got a list of 19 independent boats that's buying groceries there, not owned by DeJean Packing Co.

Q. Does it make any difference to you whether the men buy the groceries at Hall's Grocer- Store or anywhere [fol. 181] else?

A. It does in this way: We have had to pay as much as \$300 bills for oil and groceries that they go and buy somewhere else and wouldn't pay for it.

Q. In other words, then, in order for you to keep some measure of control on this you require the men to buy at Hall's Grocery Store?

A. We don't have no trouble on that. The fishermen know they are getting a good deal at Hall's. They know his prices are just as cheap as any grocery store doing business like they's doing. —I don't say these chain stores,—but they never did object to that.

Q. I want to ask you a frank question. Isn't it a fact that you wouldn't keep the fishermen in your fleet if they insisted on buying at any other grocery store?

A. I wouldn't say that.

Q. Well, would you say—

A. If it was a good fisherman, I wouldn't go that far.

Q. Would you permit all the fishermen in your fleet to buy at any grocery store they wanted?

[fol. 182] A. I'm not going to answer that.

Q. Quite a few fishermen here would like to hear your answer, I know.

By Mr. Morse: I know those you've got would.

A. We don't have no trouble with that score, with groceries. They know we pay the top prices for shrimp and they are getting just as cheap groceries there as any place on the coast.

Q. Now, Mr. Williams, you also said that the captain has exclusive authority to decide not only where to buy the groceries but also the ice and how much ice. Is that correct too?

A. That's right.

Q. You mean a captain is free to decide whether to put on the vessel five tons of ice or ten or twenty tons of ice?

A. He knows how much ice he wants.

Q. Is he free to decide how much he wants?

A. He generally comes in and orders it himself or gets somebody to order it.

Q. That doesn't answer the question. My question is, is he free to decide how much he wants to take?

[fol. 183] A. He's the one decides it. He comes to the phone himself and orders.

Q. It doesn't make any difference to you whether he orders ten or twenty tons, is that right?

A. That's right.

Q. You have never put any limit on the amount of ice a vessel can carry, is that correct?

A. I don't think so. Not as I know of.

Q. Has anyone else in your organization?

A. I don't think so.

Q. Now, when you say the men go fishing at day or at night at their own choice, isn't it a fact that they go fishing at day or night depending on how the shrimp or fish are running? They are not going to go fishing at day if the shrimp are running at night. Isn't that true?

A. No, some of them fish around the clock, fish day and night.

Q. That is to your advantage, is it not?

A. That is to their advantage.

Q. But it is to your advantage?

A. To theirs too.

[fol. 184] Q. Have you ever made any statement to any captain either privately or to any group in public that the fishermen must buy their groceries at Hall's?

A. I don't remember that. I don't remember ever making a statement like that.

Q. You mentioned something about the rig or the trawl on these vessels and that when the men leave the service of the company they are supposed to have some kind of equity in this trawl. Who decides how much that is?

A. I made the statement there is only about four or five fishermen will make enough to pay the rig out, and that's decided if they have any equity in it, it is not decided by anybody from Williams Packing and Navigation Company or anybody from DeJean Packing Company. It is decided by a neutral party, a man that makes the trawl, that knows the value of it.

Q. This man that makes the trawls, who decided the value of it,—

A. —The man that makes the trawls and the captain decide that.

[fol. 185] Q. What was that?

A. The man that makes the trawls and the captain decide that.

Q. They decide the value of the rig?

A. That's right.

Q. The two of them?

A. That's right.

Q. Suppose there is a dispute between the two of them as to the value, who decides?

A. We don't have those disputes.

Q. There are no disputes about the value of the rig?

A. We'd rather give a little bit than have those arguments. We try to get along as peaceful as we can.

Q. Now, did the Williams Packing and Navigation Company ever own any boats?

A. I think they did, yes.

Q. What boats did they own?

A. I don't remember right offhand.

Q. How many did they own?

A. A couple of them, I think.

Q. Would you say at least two?

A. Two, I think, yes.

[fol. 186] Q. Would one of them have been the "Favret"?

A. I think so.

Q. Does the Williams Packing Company and Navigation Company own those boats now?

A. I don't think so.

Q. What happened to them?

A. I don't know that. Like I say, I don't know anything about boats.

Q. You don't know anything about boats?

A. No.

Q. Who would know what happened to those boats?

A. I suppose maybe Frieberger would.

Q. Now, you were asked by Mr. Morse the financial condition of the Williams Packing and Navigation Company at the time of what he said was a levy, and I think you said that the company at that time was a deficit corporation. Do you know whether or not the company at that time had any earned surplus?

A. I couldn't answer that because I don't know the answer.

Q. Do you know whether they had any earned surplus before that?

A. No, sir, I couldn't answer that.

[fol. 187] Q. You say no?

A. I don't know.

Q. Who will know that?

A. I suppose either the auditor or Mr. Frieberger could answer that.

Q. Who was the auditor?

A. Mr. Lee Meyers. He's here.

Q. Is he connected with your organization?

A. He's an auditor.

Q. You mean he is an independent auditor?

A. Auditor, that's right.

Q. Now, the Williams Packing and Navigation Company has a so-called handling charge which it bills the DeJean Packing Company for, is that correct?

A. I think that's right.

Q. What is this handling charge?

A. Well, I don't know too much about that. The auditor can tell you that, or either Mr. Frieberger.

Q. Don't you have anything to do with the determination of that handling charge?

A. Yes, we discuss that at the end of the year.

Q. Who do you mean by "we"?

[fol. 188] A. Frieberger and I.

Q. Frieberger and you?

A. Yes.

Q. Is anybody else in on that parlay besides you two?

A. No.

Q. What do you discuss about that charge?

A. What do we discuss?

Q. Yes, what is the nature of the discussion about that charge?

A. Well, we discuss how much to pay, how much on shrimp and how much on oysters.

Q. And these discussions are held annually or monthly or when?

A. No, the end of each fiscal year.

Q. At the end of each year. You mean you don't have any other discussions during the year about it?

A. Yes, we discuss it at times.

Q. What are the discussions about?

A. Well, the upkeep on the boat, expenses on the boats and all that kind of stuff.

Q. Now, how do you decide then what the handling charge should be?

[fol. 189] A. Well, I don't know off-handed. I can't remember all that.

Q. Do you make the decision?

A. I discuss it with him.

Q. Who makes the final decision?

A. I could say both of us, all three of us.

Q. Three?

A. I mean two of us. Frieberger and myself.

Q. Just you and Mr. Frieberger?

A. Yes.

Q. Does the accountant or auditor have anything to do with that?

A. Yes, he makes recommendations.

Q. He makes recommendations?

A. Yes.

Q. To whom does he make the recommendations?

A. To both of us.

Q. To both of you. Now, Mr. Morse asked you some questions about trips in which the vessel returns as a broker. Now, a broker can be a trip which is unsuccessful where the expenses exceed the catch. Is that correct?

A. That's right.

[fol. 190] Q. Can a broker also be one in which there is no catch at all?

A. That's right.

Q. Have you had such occasions where there have been no catches at all?

A. We have occasions where they did make catches. They sold the shrimp down the river, knocked the wheel propellor off the boat, we sent a propellor down there to them, and they come back in and taken their clothes off at night, left the boat—

Q. I'm going to ask you to confine your answers to my question. We move to strike the portion of the witness' answer not responsive to our question.

By the Court: Well, he had not finished the question. I'll overrule the motion to strike, but let you ask the question again.

Q. Have you—I will re-state the question: Have you had occasions where the ships have returned with no catch at all?

A. Oh, yes, sir.

[fol. 191] Q. When the men have come in on those occasions without any catch and there have been expenses incurred, have they had any advances given them?

A. Probably so at times, if we thought the man was all right.

Q. Who makes these advances, Williams Packing & Navigation Company or DeJean?

A. Williams.

Q. Williams makes the advances to these men?

A. That's right.

By the Court: At this point we will take a recess and you can keep your line of questions in mind. I think we will recess until 1:15.

(Whereupon the Court recessed until 1:15 p. m.)

[fol. 192] (Cross Examination of Elmer Williams—continued)

(After recess)

(Mr. Nickman continues)

Q. Mr. Williams, just before the recess we were asking you about these voyages that come in which are complete brokers, where there is no catch at all, and my question there was about these advances on these brokers. If no fish or shrimp, or any other kind of seafood, is caught on this trip and it is a complete broker how do you give the men advances; where does the money come from?

A. From Williams Packing & Navigation Company.

Q. Williams Packing & Navigation Company makes the advances?

A. That is right.

Q. And from what funds does it make the advance?

A. Comes from funds out of Williams. That very seldom ever happens, these brokers.

Q. When it does happen it comes from the general funds of the Williams Packing & Navigation Company?

[fol. 193] A. That is right.

Q. With reference to this cat food operation, which you say is relatively new, did you have any discussion with the captains or the crewmen about this trash fish activity for cat food?

A. In what way?

Q. Any way.

A. I didn't have it myself. I told my son-in-law to.

Q. Would that be Leon Hall?

A. That's right.

Q. What did you tell Leon Hall?

A. Well, told him to talk to them. A lot of them come down there on their own wanting to go to work.

Q. My question was what did you tell them. Your answer was you took it up with Leon Hall. What did you tell Leon Hall?

A. I just don't remember. That has been so do-goned long. We had a strike between then and I don't know.

Q. Did you tell Leon Hall your plant was now going to handle trash fish?

A. I guess I did.

[fol. 194] Q. Do you know what Leon Hall did after you told him that?

A. No, I don't.

Q. But after you told that to Leon Hall is it a fact that your boats started to operate on a trash fish basis?

A. These boats that were supposed to go dredging for oysters come and told me they wanted to go trash fishing, and some of them told me they wanted to keep to fishing.

Q. How did they know you were going to trash fish?

A. The plant started to operate.

Q. Wasn't that brought to their attention in some way, that your plant was now going to operate in trash fishing?

A. They saw it operating.

Q. Now, these trash fish catches, are all of them brought to your plant?

A. Not necessarily. Some of the captains come and told me they was going to go to work for Bill Parks down there.

Q. You mean going to work for Bill Parks on your boats? [fol. 195] A. Our boat. Some of them told me they was going to go unload down at the mouth of the Mississippi River at Empire.

Q. I would like to ask you whether they told you that or whether they asked your permission.

A. No, they told me they were going to work for Bill Parks.

Q. What did you say?

A. Well, it wasn't nothing I could say. They had already said it.

Q. Why not?

A. Because, they told me they were going to work for Bill Parks and some of them told me they were going to work down at the mouth of the river and catch trash food and also catch some shrimp.

Q. Did it make any difference to you whether they worked for Bill Parks or anybody else?

A. Not—

Q. If they took all their trash catch to Bill Parks or anyone else, how could you possibly operate your plant?

A. They are not going to do that. The fishermen are just not going to do that.

[fol. 196] Q. Why not?

A. Because we are paying the same price as Bill Parks and the rest of them is paying, so naturally some of them is going to bring the catch to us.

Q. Did it make any difference to you whether they took it to your plant or any other plant?

A. No. When they told me they were going to go down the river and told me they was going to go to Bill Parks I never said anything.

Q. Does your company have any contracts for fulfillment to deliver so many cartons or gross of cat food?

A. A contract?

Q. Contracts or requirements for delivery.

A. We have a contract, yes, over a period of years.

Q. With what companies?

A. Alberts Company out of Los Angeles.

Q. What other Company?

A. Carnation is affiliated with Alberts or Alberts is affiliated with Carnation.

Q. What are your requirements for deliveries of cat food?

A. I can't remember that.

Q. You have requirements for deliveries, do you not?

[fol. 197] A. That is right.

Q. In other words, to meet the deliveries you have to have a regular supply of cat food, do you not?

A. They are going to close down in about a week or ten days. It is a new product on the market for them and they are going to see how it sells on the market.

Q. At the time you entered the trash food business, trash fish business, and you had these fishermen bringing trash fish in did you or not expect to receive a certain amount of trash fish?

A. We wasn't horsing for the fish, because we couldn't handle too much.

Q. Why did you install this trash fish plant?

A. We didn't install it. They installed it.

Q. Why did you permit it to be installed?

A. Because we could work trash fish in conjunction with shrimp.

Q. Well, then to keep this plant in operation didn't you have to have so many trash fish?

A. We got all we wanted.

Q. But you had to have some?

[fol. 198] A. We didn't have to have it.

Q. You either had to have it or close the plant down?

A. Well, they was on a strike for four months and we didn't get none, didn't get it then.

Q. When you weren't on strike what happened?

A. Had to put in more machinery.

Q. And you put more machinery so you could handle more trash fish, isn't that so?

A. That's right, yes.

Q. When these fishermen dispose of the catch at Parks or other places where you say they disposed of it, how is the payment made?

A. Check made out to Williams Packing & Navigation Company.

Q. Who is it made out by—Parks?

A. Parks I suppose. He *operages* the plant.

Q. How did you get the check?

A. The captain brings the check.

Q. If the captain, as you say, is not working for you but working for Parks why does he bring the check back to you?

A. To get our boat share out of it, regular share.

[fol. 199] Q. Why can't the captain, since it is his boat or his operation, you say he is working for Parks, why can't he have the catch sold and bring you back your share?

A. He could. Wouldn't be any objection to that.

Q. Would be no objection to that?

A. No, none at all.

Q. Have any of the captains ever done that?

A. They have on shrimp.

Q. With Parks on trash fish?

A. I don't know. I couldn't say. They might have.

Q. Now you say that there have been cases where your company has sustained losses where the fishermen haven't either made enough to pay the groceries and fuel and ice, is that correct?

A. I say that is on rare occasions.

Q. Rare occasions?

A. That is on rare occasions.

Q. And you say the company in those cases has sustained losses?

A. That is right.

Q. And that the fishermen have not had to pay any of those losses?

[fol. 200] A. I said on rare occasions you will get a captain to do something like that. Most of the captains will go back out and try to finish the trip and pay off.

Q. When you say "finish the trip", isn't the trip finished when the man brings the catch in?

A. Supposing they don't get any catch?

Q. You mean when he goes out again that is a continuation of the trip he was on?

A. That's right.

Q. How long does this trip continue, for days or weeks or months?

A. Well, that is according to the supply of fish or shrimp.

Q. In other words, the man, depending on how much groceries and fuel or ice, might be working with the company for a matter of months or years before the accounts between you and him are settled, is that right?

A. Oh, no, no.

Q. What is the situation?

A. Well, if he goes back the next trip and he catches something—

[fol. 201] Q. Suppose—

Mr. Morse: Let him finish.

A. If he goes back the next trip and catches something everything is taken out.

Q. What if he doesn't catch anything?

A. That just doesn't happen, Mr. Nickman. They don't make three or four trips without catching anything.

Q. Have you ever had any captains or any of the vessels in your fleet to have as many as three brokers in a row?

A. Maybe so. I just can't remember that. It is very rare if it has been.

Q. When your trawlers are in port where do they obtain the ice?

A. What's that?

Q. When your fishermen, fishing vessels, are here in Biloxi where do the vessels obtain their ice?

A. From the local ice company here.

Q. What is the name of that company?

A. Biloxi Freezer.

[fol. 202] Q. Is the ice always obtained from that company?

A. Mostly all the time.

Q. Are the men free to buy the ice at any other company?

A. Nobody has ever asked me to buy it at any other company. It never has been brought up. I have seen us at times have to get ice all in here from away over here in Louisiana.

Q. My question is confined now to when the vessels are in port, not when they are any place else. Do you have an interest in the Biloxi Freezing Company?

A. I do.

Q. What is the nature of your interest?

Mr. Morse: We object to that as incompetent, irrelevant and immaterial.

The Court: Overrule that objection.

Q. Please answer the question.

A. What's that? What is the question?

Q. What is the nature of your interest in the Biloxi Freezer plant?

A. How do you mean the nature of it?

[fol. 203] Q. Is that a corporation?

A. That is a corporation, yes.

Q. Do you have stock in it?

A. Stock.

Q. Are you an officer in it?

A. Yes.

Q. What position do you hold in it?

A. Vice-president.

Q. Have you or anyone in your organization indicated to the Biloxi Freezing plant how much ice the captains can or cannot order?

A. I never have.

Q. Do you know whether anybody else in your organization has?

A. I don't think so.

Q. You don't think that anyone in your organization put a limit on the ice?

A. I generally see them go and order their own ice. They can take only so much.

Q. The fuel which is used on these vessels, where is that usually obtained when the vessels are in port?

A. At the oil docks.

[fol. 204] Q. Which dock is that?

A. Our place down there.

Q. You mean right at the DeJean docks?

A. DeJean and Williams.

Q. And that fuel facility belongs to the DeJean Company?

A. Yes. And we have had boats that worked for us buy oil down here right at the foot of this street and some from Kuljis down at the Point.

Q. I am speaking of when the vessels are in port.

A. I am talking about when they are in port.

Q. When was that?

A. I couldn't tell exactly when, but I know they have done it.

Q. How frequently did it happen?

A. Every time they wanted to go down there or wanted to go to the Point.

Q. You don't know how many trips it was?

A. I would say most all that season.

Q. You wouldn't know whether it was in one year, or one season, or happened regularly?

A. No, couldn't tell you.

Q. Wouldn't you say that was an exceptional situation?

[fol. 205] A. Not with these particular boats. They went down to this wharf or down to the Point.

Q. Are these independently operated boats or company boats?

A. Independent.

Q. Well, Sir, we are confining this inquiry to company-owned boats. Now, you stated that you have had discussions with Mr. Sewell relative to the situation in the consumers' market, is that correct?

A. That is right.

Q. Mr. Sewell informs you as to the relative demand for a particular product, is that right?

A. That is right.

Q. And you are in a position, or you do ascertain from your captains, what the supply of a particular type of product is, is that correct?

A. No, I never question the captain about the supplies.

Q. You determine the supply by seeing what is brought in?

A. I don't think he could answer that his self. He don't know.

Q. How much time do you spend around the plant?

A. I spend from 5:30 in the morning 'til 4:30 in the afternoon.

[fol. 206] Q. Are you pretty much all around the plant or just stay buried in the office?

A. Oh, no, I am all around.

Q. You are all around, so that you do see whether the men are bringing in large catches or small catches of shrimp, is that correct?

A. Sure.

Q. And you also see whether they are bringing in jumbo size, medium size, or small variety of shrimp, is that correct?

A. Oh, yeah.

Q. So you are in a position to know from your activities in the plant the supply of a particular type of shrimp or oysters or trash fish, is that correct?

A. Supply that day.

Q. Supply that day?

A. That day, yes.

Q. And from day to day?

A. From day to day, that's right.

Q. You are there every day?

A. Every day.

Q. Now, in order for you to establish, as a partner in [fol. 207] the DeJean Company, what the resale price of the finished product is going to be you have to know what the price is going to be in the purchase market from the catches, is that correct?

A. I guess so, yes.

Q. You stated in this morning's session that the Williams

Packing & Navigation Company has what are known as ground leases or fishing leases with the State of Louisiana.

A. What is that again.

Q. You stated this morning that the Williams Packing & Navigation Company has leases on oyster grounds in the State of Louisiana?

A. I said that you got to lease so much ground in order to operate so many boats.

Q. Are these written leases?

A. From Louisiana, yes.

Q. What years, if you have those written leases?

A. I don't know what years.

Q. Who would know?

A. You got to get so much ground leases in order to put so many boats on it.

[fol. 208] Q. Who would know whether you have written leases with the State of Louisiana?

A. They might not be in writing. I don't know if they are in writing or not. But I know you got to lease so much ground in order to put so many boats out there dredging oysters.

Q. How do you know that?

A. Because they have an inspector over here that checks the boats when they come in, a Louisiana inspector.

Q. You mean he asks the captain if he has a lease or if you have a lease?

A. We automatically know we have to lease so much ground in order to put on so many boats.

Q. My question is how do you know.

A. We know it. That is the state law of Louisiana.

Q. the law of Louisiana is that you have to have a written lease?

A. I never said writing.

Q. You said you have to have a lease.

A. I think it's for five boats you have to lease 250 acres of ground. If they give us that in writing, I forgot; [fol. 209] I don't know. But I know you got to lease ground in order to get oysters out of Louisiana.

Q. Do I understand that you cannot get oysters in Louisiana except by a lease? Is that the understanding?

A. That's right. You have got to get some kind of per-

mission from Louisiana and you got to pay so much an acre for that ground.

Q. I didn't say permission; I said lease.

A. Lease. Maybe it is lease, but I didn't remember seeing any lease, written lease.

Q. Mr. Williams, in the year 1952 what approximately were the sales of the DeJean Packing Company?

Mr. Morse: We object to that. DeJean is not a party interested in this case and the question is incompetent, irrelevant and immaterial.

The Court: Overrule the objection, if he knows.

A. I don't know.

Q. Would you say it was approximately \$2,000,000.00?

A. I wouldn't have any idea.

Q. Mr. Williams, you were asked in the grand jury pro-[fol. 210] ceeding that I referred to this morning this question: "What is the amount of business that you did in 1952?"

Your answer was:

"We done about \$2,000,000.00 worth." Is that correct?

A. That must be the truth if I said it.

Q. Do you happen to know how much business you did in 1958?

Q. No, sir.

Q. Would you say that it could have been as much as more than \$2,500,000.00?

A. It could possibly be, yes.

Q. Do you know what the net worth of the DeJean Packing Company was as of the end of December 1958?

Mr. Morse: We object to that. Clearly that is incompetent, irrelevant and immaterial.

The Court: If he knows I believe I will let him answer. Overrule the objection.

A. I have no idea.

Q. Would you say that it was as much as more than \$700,000.00?

[fol. 211] A. Wish somebody would come offer us that for it.

Q. Pardon me.

A. I say I wish somebody would give us that for it.

Q. Has the DeJean Packing Company ever given a financial report to the Dunn & Bradstreet Company?

A. I can't answer that.

Q. You don't know?

A. Don't know.

Q. Who would know?

A. Mr. Frieberger would know that.

Q. You were asked this morning on direct examination by Mr. Morse that prior to the anti-trust proceeding you had no way of establishing prices that you pay for fish but that was a matter more within the control of the fishermen. When would you say was the date at which the normal law of supply and demand came into play?

A. I can't remember that.

Q. Would you say it was the date when the union was convicted or the date that the indictment was returned against the union?

A. I couldn't remember that.

[fol. 212] Q. Did you testify before the grand jury that the fishermen or the union were controlling the prices?

Mr. Morse: We'd like for him to read the question. He has got the transcript there and if he wants to question him about it we'd like for him to question him as to what he testified before the grand jury about.

The Court: Overrule the objection. If you remember whether you testified to that or not you may answer?

Witness: I don't remember if I testified to it.

Q. Mr. Williams, do you know whether the Williams Packing & Navigation Company at the time of the Revenue Service's investigation was in a position to pay the proposed tax for any taxable quarter?

A. I couldn't answer that.

Q. Who can answer that question?

A. The man that keeps the books can answer that.

Q. Who would he be?

A. Mr. Frieberger, he keeps the books.

[fol. 213] Q. Mr. Nickman: Counsel has stipulated for the admission of the Certificate of Incorporation of the Wil-

liams Packing & Navigation Company, Inc. May this be marked for identification and admissison?

The Court: Let it be admittted and let it be marked.

(Same received and marked as Defendant's Exhibit No. 1, which exhibit is copied here below.)

DEFENDANT'S EXHIBIT #1

STATE OF LOUISIANA

WADE O. MARTIN, JR., I, The Undersigned Secretary of State, of the State of Louisiana, Do Hereby Certify That the annexed and following five (5) pages contain a true and correct photostat copy of Articles of Incorporation of Williams Packing and Navigation Company, Inc., A corporation organized under the laws of the State of Louisiana, domiciled at New Orleans, Louisiana, all of which is shown [fol. 214] by comparison with document on file and of record in the archives of this Department.

Given under my signature, authenticated with the impress of my Seal of Office, at the City of Baton Rouge, this, 20th day of January A. D. 1959.

/s/ Wade O. Martin, Jr., Secretary of State. Seal.

RECORDER OF MORTGAGES FOR THE PARISH OF ORLEANS

OFFICE

Corner Royal and Conti Streets

New Orleans, La., June 7, 1944.

I, the undersigned Recorder of Mortgages, in and for the Parish of Orleans, State of Louisiana, do hereby certify that the above and foregoing Act of Incorporation of the Charter of Williams Packing and Navigation Company, Inc. was this day duly recorded in my office, in Book No. 1658 Folio . . . C 1:35 P.M.

New Orleans, June 7, 1944.

/s/ G. M. Schoenfeld, Dy. Recorder of Mortgages.

[fol. 215] Be It Known and Remembered, That on this, the second day of June, 1944, before me, the undersigned authority, a Notary Public in and for Harrison County, Mississippi, therein presently residing, duly appointed, commissioned and qualified, personally came and appeared the several persons whose names are hereunto subscribed, each a resident of Harrison County, Mississippi and over the age of twenty-one years, who declared to me, Notary, in the presence of the undersigned competent witnesses, that availing themselves of the provisions of the laws of the State of Louisiana, relative to the formation of corporations, and particularly of provisions of Act 250 of 1928 of the Legislature of Louisiana, as amended, they have covenanted and agreed, and do by these presence covenant and agree and bind themselves, as well as all other persons who may be hereafter associated with them, to form and constitute a corporation and body politic in law, and they do hereby organize themselves, successors and assigns into such corporation in accordance with and under the following articles of incorporation:

A. The name of the Corporation shall be "Williams Packing and Navigation Company, Inc."

[fol. 216] B. The purposes for which the corporation is formed are: To engage in the sea food packing business; to own, operate, lease, manage and control boats, machinery appliances, tackle for the purpose of engaging in fishing operations and the fishing for, dredging and catching of oysters, shrimp, crabs, and all species of fish; to do any and all things incident to and necessary to the engaging in the sea food packing business, and in the fishing or catching of all species of sea food, such acts to be performed by the corporation, however, not to be contrary to law.

C. The amount of paid in capital with which the corporation will commence business is One Thousand Dollars (\$1,000.00). All said capital has been paid in in cash.

D. There shall be only one series of stock issued: all stock shall be of the same class, to-wit: common stock. Each share of stock shall entitle the owner thereof to one vote in all matters affecting the affairs of the Company. No share shall have preference over any other share, as to dividends or otherwise.

E. The total authorized number of shares shall be forty shares of the par value of \$25.00 each.

F. The location and post office address of the registered office is Williams Packing and Navigation Company, 1223 [fol. 217] Decatur Street, New Orleans, Orleans Parish, Louisiana.

G. The period of duration of the corporation shall be fifty years from the date hereof.

H. The number of directors of the corporation shall be three. The names and postoffice addresses of those selected for the first Board of Directors are:

Elmer Williams, Biloxi, Mississippi.

Carroll Williams, Jr., Biloxi, Mississippi.

L. Freiburger, Biloxi, Mississippi.

I. The names and postoffice addresses of the incorporators of the corporation are:

Elmer Williams, Biloxi, Mississippi, 19 shares

Carroll Williams, Jr., Biloxi, Mississippi, 19 shares.

L. Freiburger, Biloxi, Mississippi, 2 shares.

J. The agents for service of process on the corporation are hereby designated as and declared to be:

Alvin R. Christovich, 1912 American Bank Bldg., New Orleans, La.

Wm. J. Kearney, 1912 American Bank Bldg., New Orleans, La.

K. Unless and until otherwise provided in the by-laws, all of the corporate powers of this corporation shall be vested in and the business and affairs of the corporation [fol. 218] shall be managed by a board of three directors. The board of directors shall have authority to make and alter by-laws, including the right to make or alter by-laws fixing their qualifications, classification or term of office, or fixing or increasing their compensation, subject to the power of the shareholders to change or repeal the by-laws so made.

The general annual meeting of the shareholders for the election of directors shall be held at the registered office of the corporation and shall take place on the 10th day

of September, of each year, or the first business day thereafter when such day is a legal holiday, beginning with the 15th day of September, 1944, unless or until otherwise provided in the by-laws.

Unless or until otherwise provided in the by-laws, directors shall hold office for one year, or until their successors have been duly elected and qualified; but the number, classification, qualifications, terms of office, manner of election, time and places of meetings, and the power and duties of directors shall be as, from time to time, fixed by the by-laws. Any director absent from a meeting may be represented by any other director or shareholder, who may cast the vote of the absent director according to the written [fol. 219] instructions, general or special, of said absent director, filed with the Secretary.

Thus done and signed in my office in the County of Harrison and State of Mississippi, aforesaid, on the day and month and year herein above set forth, in the presence of E. M. Wallace and Mabel G. Dalzell, the undersigned competent witnesses, and me, Notary, after due reading of the whole.

/s/ Elmer Williams, /s/ Carroll Williams, Jr., /s/
L. Freiburger, Incorporators.

Witness: /s/ E. M. Wallace, /s/ Mabel G. Dalzell.

/s/ O. G. Swetman, Notary Public, Harrison County,
Mississippi.

My commission expires 12/26/46.

STATE OF MISSISSIPPI,
County of Harrison.

I, the undersigned Chancery Clerk of Harrison County, Mississippi, do hereby certify that O. G. Swetman, the [fol. 220] Notary before whom the annexed Articles of Incorporation were passed and executed, is a duly appointed, qualified and acting Notary Public in and for Harrison County, Mississippi, and was such Notary on June 2nd, 1944. That the appointment and commission of said Notary is recorded in the office of the undersigned Clerk, the official custodian of such records; that the commission of said O. G. Swetman, Notary, expires December 26, 1946. I further

certify that the signature of O. G. Swetman is well known to me; that the signature "O. G. Swetman" appearing on said Articles, is the true signature of O. G. Swetman, Notary as aforesaid. Said Notary is empowered to act in the capacity of Notary anywhere in Harrison County, Mississippi.

Witness my signature this 5th day of June, 1944.

/s/ C. J. Darby, Chancery Clerk, Harrison County,
Mississippi. (Seal)

[fol. 221]

OFFER IN EVIDENCE

Mr. Morse: While we are on that couldn't we also stipulate that it qualified to do business in the State of Mississippi?

The Court: It is stipulated it is qualified to do business in Mississippi, is it?

Mr. Morse: Yes, sir.

The Court: Mr. Nickman, you stipulate that it is qualified to do business in Mississippi?

Mr. Nickman: Yes, sir.

The Court: Let that be marked.

(Same received and marked as Defendant's Exhibit No. 2, which exhibit is not copied here because upon order of the Court the original exhibit will be sent up with this record.)

(Mr. Nickman continues):

Q. I invite your attention to Paragraph B on page 2 of the Certificate of Incorporation and ask you whether or not the Williams Packing & Navigation Company is not authorized, among other things, to manage and control boats, is that correct?

Mr. Morse: We submit that it speaks for itself.

The Court: Yes.

[fol. 222] Mr. Nickman: We are asking the witness whether he can recognize and has an understanding of what the situation is.

Q. Is that correct, Mr. Williams?

A. According to that paper.

Mr. Nickman: I think that is all.

The Court: Any redirect?

Mr. Morse: Yes, sir, just one question, Your Honor.

Redirect examination.

By Mr. Morse:

Q. Mr. Williams, Mr. Nickman this morning stated for impeachment purposes—he was asking certain questions from the transcript of the grand jury investigation of the Gulf Coast Shrimpers and Oystermen's Association and the question he asked was "Do you have radio equipment on your boats?" and your answer was "Some of them." Now, he asked you further "Could you call those boats if you wanted to?" and you said "Yes." is that correct?

A. That's right.

[fol. 223] Q. The next question in the transcript, which was not asked you but which is underscored in the transcript, and not by us, "The captain doesn't have anything to say about being called in?" and your answer "No, if we want to call them in, but we never have occasion to call them in unless it was on account of sickness or something." Is that correct?

A. That is right, yes.

Mr. Morse: That is all.

Mr. Nickman: I have no further questions.

The Court: You may stand aside.

Witness excused.

[fol. 224] LUCIUS FRIENBERGER, called as a witness by the plaintiff, having first been duly sworn, testified as follows:

Direct examination.

By Mr. S. E. Morse, Sr.:

Q. Your name is Lucius Frieberger?

A. Lucius Frieberger.

Q. You are better known as Lou, so we will call you that. Lou, what position do you occupy with the DeJenn Packing Company, a co-partnership?

A. I am the bookkeeper and also act in the capacity as Office Manager.

Q. By Office Manager, does that mean the books and the personnel under you?

A. That is right.

Q. What position, if any, do you occupy in the Williams Packing & Navigation Company?

A. Well, I have been a director and I am also a stockholder and secretary.

Q. Now, for the purpose of the record, I believe it has been stated, but I wish you would state it, who composes the partnership—the co-partnership of DeJean Packing Company?

[fol. 225] A. Mr. Elmer Williams and his wife, Mrs. Cornelia Williams; Mr. Carroll E. Williams, Jr., and his wife, Mrs. Ophelia Williams.

Q. Are there any other partners in the DeJean Packing Company other than those you named?

A. No, sir.

Q. Who are the stockholders in the Williams Packing & Navigation Company, Inc.?

A. Mr. Elmer Williams, Mr. Carroll Williams, Jr., and myself.

Q. Do you know the proportion of the stock that is owned?

A. No, sir, not offhand. I think it is about—. I would just be guessing.

Q. How many shares?

A. I think it is 100 shares and I think each one of the Williamses own about forty-eight.

Q. Are you guessing now?

A. Guessing. Guessing. I don't know.

Q. You are the secretary of the Williams Packing & Navigation Company, are you?

A. That is correct.

Q. And do you keep the books of the DeJean Packing Company?

[fol. 226] A. I do.

Q. Do you keep the books of the Williams Packing & Navigation Company?

A. I do.

Q. What kind of books of account do you keep for DeJean Packing Company?

A. The usual books of account.

Q. That is, the ordinary books that business concerns such as DeJean Packing Company would keep?

The journals and ledgers?

A. That is right.

Q. And invoice accounts, and so forth.

A. That is right.

Q. Now, what kind of books of account do you keep for Williams Packing & Navigation Company?

A. The usual books consistent with good accounting practice.

Q. And are they similar in type and character to the ones of DeJean?

A. They are similar, but they are entirely separate, a separate set of books.

Q. I understand they are separate, but your journal and your ledger?

[fol. 227] A. That is right.

Q. The usual set of—

A. That is right, the journal and the ledger.

Q. —books for bookkeeping entries?

A. That is right.

Q. How long have you been employed by DeJean?

A. Since 1938.

Q. Has that been continuous from then until now?

A. Yes, continuous.

Q. Now, who for DeJean handles the partnership business of DeJean, Mr. Frieberger—what partner?

A. Mr. Elmer Williams is the general partner and he handles most of the business.

Q. What officer of the Williams Packing & Navigation Company handles its business?

A. Mr. Elmer Williams handles it and I handle some of it. Mr. Elmer Williams is the president, and I handle most of it. Mr. Williams isn't too familiar with most of the office details and day to day transactions. I handle that of my own.

Q. Who handles the outside transactions, about the selection of the captains to let have the boats?

A. Mr. Elmer Williams.

[fol. 228] Q. Do you have anything to do with that?

A. No.

Q. Now, about the sale of shrimp or trash fish or oysters to DeJean, who handles that?

A. I handle the transaction on it.

Q. Explain to the Court how that is done, Mr. Frieberger?

Let's take one boat that goes out and brings the catch back. Explain to the Court what steps are done in the catching and sale of that product from Williams to DeJean?

A. Well, when the boat comes in—

Q. I am talking about when it goes out.

A. When the boat goes out?

Q. Yes. Let's begin from the time it leaves the wharf and then comes back.

A. I don't know what they do when they go out.

Q. I mean do they purchase fuel and—

A. They purchase fuel. The captain sees to it that the boat is fueled up. They order the groceries from the grocery store and they tell the ice company—telephone the ice company to say how many tons of ice they want.

[fol. 229] Q. Then when the fish or shrimp are brought in how is that handled?

A. When the fish or shrimp are brought in a tally sheet is brought up to the office to show how many was received in the plant and from there we compute the value of the catch.

Q. You are talking about "we". Who computes that?

A. The Williams Packing computes the value of the shrimp or whatever is brought in and makes certain records of them and pays the boat captain. You don't want me to go into—

Q. Yes.

A. Well, the trip expenses, such as fuel and groceries and the ice crushing charges are deducted from the gross catch. The net catch is then divided one share each for each member of the crew and the captain, and one share for the use of the boat, and one share for the rig until the rig is paid for.

Q. After the rig is paid for what happens to that?

A. There is no deduction unless the captain wishes to [fol. 230] allow or continue a deduction so that he will have a credit balance on his rig in case he gets into trouble and loses a large amount of his rig.

Q. When that catch is brought in who purchases it?

A. Williams purchases it.

Q. And then when it is sold by Williams who purchases it?

A. DeJean Packing Company purchases it.

Mr. Nickman: At ~~this~~ point I would like to note in the record that whether or not the delivery of the catch by the captain and the crew of the vessel is a sale or a purchase is a conclusion of law. That is one of the things we are attempting to ascertain in this case. If for ease in asking the question counsel wishes to use the words "purchase" or "sale", we are not going to object. But we would like to note that that is what we are trying to ascertain, whether it is in fact a purchase or a sale.

The Court: I agree with you at this time to the extent that it is ultimately a question of law for the Court to determine, but I will permit this witness to give his interpretation and the conduct and details of how it is handled, [fol. 231] and, of course, you can cross-examine thoroughly on it. But the fact that he uses the word "purchase" or "sale" in his direct examination is not conclusive on the Court by any means.

Q. When it is purchased by Williams Packing & Navigation Company from the fishermen what instrument is issued by Williams to the captain of the boat for that catch?

A. A check.

Q. And is that check payable in the amount of the catch less the deductions?

A. Yes. It is issued to the captain in the payment of his share and the crew's share.

Q. Is that check a negotiable check drawn on a bank in Biloxi, Mississippi?

A. Yes, sir. It is a check drawn on the People's Bank of Biloxi.

Q. Does the People's Bank of Biloxi honor those checks when they are presented?

A. Yes, sir.

Q. When the Williams Packing & Navigation sells to DeJean the raw product explain to the Court how that transaction is handled.

[fol. 232] A. Well, DeJean is invoiced by Williams at the end of the month for purposes of simplification for the total amount of product delivered during the month to DeJean, and that is set upon Williams' books as a sale

and a charge to DeJean Packing Company. And, of course, on the DeJean Packing Company's books it is set up as a purchase and as a credit or liability to Williams Packing Company.

Q. Is that liability subsequently settled, and if so, how?

A. Well, DeJean will from time to time make a payment on account.

Q. Just explain what you mean by making a payment on account. Does it issue a check?

A. DeJean will issue a check not necessarily in the full amount of the invoice but on varying sums of money. DeJean issues a check to Williams Packing & Navigation Company, which Williams in turn deposits in the People's Bank.

Q. Is that check a negotiable check?

A. Yes.

Q. Is that check cashed by the People's Bank of Biloxi and placed to the credit of Williams?

[fol. 233] A. Yes, sir.

Q. Since the Williams Packing & Navigation Company has been in existence has that been the method by which Williams and DeJean have operated or not?

A. To the best of my knowledge it is.

Q. Now, you have been with them, I believe, for twenty-one years?

A. That's right.

Q. Do you know how the vessels have been turned over to the captains by Mr. Williams—I mean from your general knowledge of the business—over the period of years?

A. Other than the fact that men will come to the plant from time to time to see Mr. Williams and ask him for a boat, that is all.

Q. I meant the details. You don't know the details?

A. No.

Q. Do you know that they have been turned over to them?

A. Yes, I do. Sometimes I am a little late in finding it out, but I eventually find out that so and so is captain of such and such a boat.

Q. How is a crew member selected? Do you know who [fol. 234] selects the crew members?

A. The captain has complete charge of that.

Q. Does Williams, insofar as you know, or any of the other officers, have they ever selected any crew members for the fishing vessel?

A. Never.

(Whereupon the court took five minutes recess)

(Mr. Morse continues direct examination)

Q. Mr. Frieburger, you stated that you had been employed at the plant down there for approximately twenty-one years, is that right?

A. That's right.

Q. In that period of time have you learned how the boats had been operated by the boat captains and crew members—I mean the method of operation?

A. You mean for settlement purposes?

Q. For settlement purposes and all purposes, yes.

A. I have a pretty fair knowledge of that.

Q. What was the method, was that an oral understanding, Mr. Frieburger?

A. Yes, it was an oral understanding.

[fol. 235] Q. And when was that reduced to writing, if it was?

A. I think that was reduced to writing sometime in January of this year.

Q. January of 1959?

A. Yes.

Mr. Nickman: Please keep your voice up. I can't hear your answers.

Witness: Yes, sir.

Q. I now hand you original of what is designated Demise & Lease of Fishing Vessel. Look through those, Mr. Frieburger, and identify them by names and boats, if you will, and the number.

A. The number of documents we have here?

Q. The number of documents.

A. There are two documents for the boat Alma Mae.

Q. Who are the boat captains?

A. The boat captain as of January 16th was John H. Bosarge.

Q. What did he do with the vessel? Did he surrender it?

A. He surrendered the vessel and a new captain was signed on in January 24, 1959.

Q. Now, go ahead with the others.

A. The boat Carroll & Ivan K.

[fol. 236] Q. Who was the captain of that?

A. Shelton Touchet.

Mr. Nickman: I don't know whether counsel plans to offer these documents in evidence or not.

Mr. Morse: I do. And we furnished copies to Mr. Nickman, Your Honor, so he can follow us along.

Q. And the Connie Ann was to whom?

A. The next boat is the Connie Ann and the captain Tony Gruich, signed January 22, 1959. The next boat the Elmer Williams II, signed by Jack Williams on January 22, 1959. The next boat is the Eustis McManus, signed by Captain George Blanchard on January 22. The next boat is the Glenny Boy, signed by Captain Palmer Schultz on February 3, 1959. The Irma Germaine, signed by Captain Frank George Ross on January 20th. The vessel Jerry O'Keefe, signed by Louis Tóherrey on January 23rd. The vessel Jim Eastland, signed by Herman J. Allen, otherwise known as Joseph Allen, on January 17th. The boat Kay Ann, signed [fol. 237] by Wildon Ross on January 16. The boat Ophelia Williams, signed by Captain William Clarke on January 12th. The boat Reub Junge, signed by George Henry Sprinkle on January 12. The vessel Robert B. Favret, signed by John M. Clarke on January 12th. The boat Ronald Jr., signed by John H. Bosarge on January 24. The vessel Sandra Nell, signed by Leon D. Barnes on January 23rd. The vessel Standby, signed by H. C. New on January 16. And the vessel Walter Morrow, signed by Ralph Olier on January 23rd.

Mr. Morse: Now we desire to offer these in evidence. Excuse me. Before I offer those—

Q. Have you read the demise and lease of the fishing vessels, the terms of it?

A. Yes, I have.

Q. By whom is it signed on behalf of Williams Packing & Navigation Company?

[fol. 238] A. I signed them—all of them.

Q. Mr. Frieberger, state of the method described in each of these demises or lease agreements you have testified about was the same, to your knowledge, method of operation under the former agreements with the boat captains?

A. Some of them were.

Q. Now, will you say which ones are different, if you can point them out there; and for Mr. Nickman, I would like the boat and the captain.

A. The agreement on the vessel Alma Mae signed by John H. Bosarge on January 16th, the agreement on the vessel Glenn Boy, Ophelia Williams, Reub Junge, Robert B. Favret, Ronald Jr., and Sandra Nell—let me see if there are any others. That is all. Those contracts are a little bit different—

Q. Explain to the Court.

A. —from what we have been doing in the past.

Q. Explain to the Court how they are different from the others.

A. Well, these agreements—this is what is known as a [fol. 239] 50-50 share arrangement. In this arrangement the company, the corporation, and the captain, the crew I should say, pay for half of the ice. In other words the ice is taken off of the top. Out of the remainder, the remainder is then divided 50-50, and out of their 50% the crew pays for groceries and for labor only on net repairs. Out of the corporation's 50% must be paid the fuel, and, of course, the boat repairs and upkeep and the nets are furnished, and the material for the repair of said nets are also furnished and paid for by the corporation.

Q. Now, in what respect is that different from the others?

A. The other agreements are on what was known as the share basis. On these agreements the trip expenses such as the fuel and the groceries and the ice are deducted from the top and the net is then divided one share each for the captain and each crew member, one share for the boat, and one share for the rig until the rig is paid for. After the rig is paid for no deductions are taken.

Q. Is there any other difference in any of those lease [fol. 240] agreements except the dates and names of the captains except that difference you mentioned?

A. No, sir, there is no other difference. This is the way we have been operating all along with one exception here.

Way back a few years ago the ice was normally furnished, but we preferred to go ahead and give the men, allow them, an extra amount on the price of shrimp and let them pay for the ice. In other words, let the ice come off with other expenses. That is the only difference. Otherwise these boats are shared the same as they have always been shared.

Q. You say the only difference is this is now in writing and the other was oral?

A. That's right. This written agreement is the same as the oral, our understanding orally, in the past.

OFFERS IN EVIDENCE

Mr. Morse: We desire to offer the originals and substitute photostatic copies.

(Same received as Plaintiff's exhibits 8 to 25, inclusive, which exhibits are not copied here because upon order of the Court the original exhibits will be sent up with this record.)

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Nickman: May we be heard on these?
[fol. 241] The Court: Yes.

Mr. Nickman: We object to the offer of each and all of these documents on three separate grounds. First, the offer of these documents represents an event or transaction which occurred after the institution of this litigation.

Secondly, the offer of the leases is an offer of a document which is clearly outside the ambit and perimeter of the scope of this case as laid down in the pleadings and as laid down in the protest to the Revenue Service. May I comment on that? It is well settled that when a protest is filed before the Revenue Service the grounds set forth to the Commissioner of Internal Revenue limit the tax payer to those grounds. He may not expand his case beyond those grounds. It has been set forth in this case from its inception up until this morning that this has been a joint venture. The offer of these leases tends to negative that fact and shift it from a joint venture to a lease arrangement. Moreover there is testimony in the record where it sometimes has been referred to as a charter.

[fol. 242] So any attempt to vary what has been set out in the pleadings and before the Commissioner as represented in the protest we would object to.

We believe the leases are not admissible for that reason.

Finally, on the face of the leases themselves, if they may be called leases, it is stated that—. Well, I want to strike that last remark and say this: That at the hearing last week Mr. Morse handed us a blank form of lease. Now that blank form of lease we were led to believe was the type of lease that Mr. Morse was going to produce in court this morning. We have a copy of it here. That lease which he showed us is not the same as these leases which he now proposes to offer.

The Court: I will sustain the objection to an introduction of them and let them, of course, be marked for the record, made a part of the record; but I will exclude them from consideration in arriving at a judgment in the case for the reason that I think the issues to be determined here arose during the years for which the assessment was made [fol. 243] and that the proof should be confined as to what happened and what was the practice during those years for which the present assessment has been made and which is now in controversy, and I think the transactions that happened subsequent to that would be irrelevant and immaterial. For that reason I will exclude them from consideration and sustain the objection.

Mr. Morse: May I ask if that now is going to be the Court's ruling in the future on transactions subsequent to 1955?

The Court: Yes, unless it might be competent and relevant on some other feature of the case. This morning there came in something that has happened subsequent, but I believe it went in without objection, and was with reference to the practice in handling the cat food. Of course under the testimony developed this morning the cat food industry came in subsequent to the years for which these assessments were made. But I don't think that throws a great deal of probative force one way or the other, the way the cat food transactions happened, and no objection was made and that remains in. But I will rule upon each

[fol. 244] objection or question of subsequent occurrences as the question may arise.

(Mr. Morse continues):

Q. Lou, will you get your share slips, please. Let's confine ourselves to the years '53, '54 and '55. Do you have share books covering that period of time?

A. I have a few of them here. I am going to have to segregate them. '53, '54 and '55?

Q. Yes.

A. What was it, now?

Q. '53, '54 and '55. Do you have '53 there?

A. I have some '53.

Q. Now, I notice that you have some of those marked and you have shown them to me. Now the books that you have there, what are they?

A. These books are share slip books showing the settlement that was made with the fisherman for the catch of shrimp. I may have a few here on oysters, but generally they are settlement sheets, copies of our settlement sheets, on shrimp.

[fol. 245] Q. The share book that you have before you there now is what date?

A. These are for shares between November 13, 1953, and December 8, 1953.

Q. You have certain pages marked there. Now take the first one that is marked. What does that indicate on the share book there.

A. I marked this one because there was a check brought in for some shrimp that was delivered to someone else other than to Williams Packing & Navigation Company.

Q. How much was that check?

A. This check was for \$26.25.

Q. What was the name of the boat?

A. The boat Glenny Boy.

Q. Who was the captain of the boat?

A. Oliver Simmons.

Q. You have another marked there, have you?

A. Yes. Here is one for the boat Brenda on November 27th by George Forshee and it shows "Cash-Other, \$156.25".

Q. What did that indicate to you when it was brought into you?

[fol. 246] A. I don't recall what exactly happened at that time, but looking at the record it would indicate to me some cash money was brought in for some shrimp sold elsewhere for cash.

Q. If they sold to Williams Packing what would have shown on that slip?

A. Well, it would show up here along with the other shrimp where it was delivered to the plant. In other words, there was some other shrimp besides this cash on this slip.

Q. How much cash was there?

A. \$156.25.

Q. What was the date?

A. November 27, 1953.

Q. Do you have another marked one there?

A. I have one here dated December 19th, 1953, the boat Jerry O'Keefe. Gustave Freche was captain and he brought in cash \$143.92 along with some other shrimp that was delivered at the plant.

Q. With some shrimp?

A. That's right. The shrimp was delivered at the plant.

Q. What does that record indicate to you?

A. That he sold some shrimp somewhere and got cash [fol. 247] money for it.

Q. Do you have another one there?

A. Yes. This is another one of the boat Glenney Boy, Oliver Simmons the captain, October 15, 1953. It says, "Check—Mavar". That would indicate that some shrimp was put on one of Mavar's freight boats. We had a freight boat system at this time. He went over there and got a check for the value of the shrimp that he unloaded on their boat.

Q. How much was that check?

A. \$273.80.

Q. You have another one there marked.

A. Yes. This is one for the boat Miss Ocean Springs. However, this is an independent boat. You may not want to use this one.

Q. Let's eliminate that boat. On the last one did Williams buy from the independent boat you are talking about?

A. Oh, yes.

Q. How much?

A. On this particular share slip? I don't remember. [fol. 248] Let's see if I can find it. On this particular trip nine and a half barrels and fourteen pounds, and it says "Cash \$579.70. That could have been a check because there is a memorandum he unloaded the shrimp at Gulf Central. Must have been a check.

Q. The Miss Ocean Springs wasn't owned by Williams, was it?

A. No, sir. These other share slips that are marked here are marked for a different purpose.

Q. Explain the purpose.

A. First I am going to have to back up and give a little background on the reason for these things.

Q. All right.

A. And I will have to explain this freight boat system.

Q. All right. We want you to explain it.

A. Up until about March of 1953, and I say about March because my records do not show a clean break as to the date when we may have changed or when we did change this operation from a freight boat system, and I have found in the records as late as November of '53 and even later [fol. 249] than that where some of these boats were bringing in shrimp for other boats on this so-called freight boat system. But anyway, prior to this time we had in effect two fleets of boats, one fleet was called a freight boat fleet and the other was called the catch boat fleet. Now the freight boats were the larger of the boats and they had ice in their holds in order to preserve the shrimp. The catch boats did not have ice in their holds. Their primary function was to go out and catch the shrimp, and then once or twice a day unload that shrimp on a freight boat where they would then be iced and stored away in the hold.

Q. Let me interrupt you there at that point. When they unloaded on a freight boat would it necessarily have to be a freight boat sent out by Williams Packing & Navigation Company, or a freight boat of some other company?

A. No, sir, they would not necessarily unload on a Williams freight boat. They actually unloaded on other freight boats. It depended on what boat was in the area at that time.

[fol. 250] Q. Go ahead now.

A. Now, I think that clarifies the freight boat system except for one point I want to make, and that is the freight boats also caught shrimp when they were not busy icing down the shrimp unloaded on them by the catch boats and they would, of course, stow their own *thrimp* in the hold, mix it up with all the rest of the boats. The reason I have marked these share slips is because of an item that appears on each one of them which says "weigher". On this particular share slip for the boat Peck Williams, Joe Delahoussey the captain, is an item "50¢ weigher". In way of explanation, when we changed from the freight boat system to letting all the boats bring in their own shrimp some of these captains and the crew members were not entirely satisfied that they were getting the correct weights for their shrimp when they were delivered at the plant. So they were told that if they desired to have someone check weights for them that it was perfectly agreeable and that they could pay the person so employed and that [fol. 251] amount expended could be put on the share slip along with other expenses so that the boat would also pay its fair share. That is what all of these tabs are for. I just tabbed a few of them just to show it.

Q. Do you have any others there that show where catches were sold outside of and away from the plant to other parties?

A. No, sir, not for these particular years.

Q. Do you have any for '54 or '55?

A. No, sir, the others that I have marked are subsequent. They are '56, the majority of them—some '57.

Q. And you gave me a lot of them for '58, but since the Court has ruled out '58 we won't go into that.

A. Yes, sir. I gave you some actual tickets that these fellows brought of cash money.

Q. We won't go into '58.

A. Excuse me, I do have some more. I have one for 1954 in December, a cash item here, December 21, 1954, the boat Irma Germaine, Charles Marshall captain. He brought in along with some shrimp \$114.14 cash.

Q. Who was Marshall, was he a boat captain?

[fol. 252] A. Yes. I'm sorry, I have found some others. I thought these were set aside.

Q. All right. Go ahead.

A. This is the Miss Ocean Springs again, but that was an independent boat so we will skip that.

Q. Did you buy from them at that time?

A. Oh, yes. And he unloaded his shrimp at Mavar for some reason. And the Sadsack on May 7th also unloaded shrimp at Mavar's. The captain was Edwin Boudreaux. And the boat Brenda unloaded at Mavar's on May 7, 1954. George For hee was captain. I have here a share slip dated May 13, 1954, the vessel Alma Mae, Francis Girouard captain, and the only item shown there is "Cash, \$1056.76".

Q. Does your record indicate that was delivered to you?

A. No, sir, that was cash.

Q. For what?

A. Presumably for shrimp that had been sold.

Q. I say was that cash delivered to you?

A. Oh, yes, cash was brought and a settlement sheet was made for it.

Q. Settlement sheet was made?

[fol. 253] A. Yes, sir. That is what these are. And I have another dated May 13, 1954, boat Reub Junge, Ramsey Girouard captain, cash \$1,060.89, presumably for shrimp that had been already sold.

Q. The cash was brought to the office instead of the shrimp?

A. That's right, and the settlement was made on the cash.

Q. Go ahead.

A. On May 13, the vessel Ronald. Jr., Sagasta Lauglinais captain, cash, \$1,084.00 brought into the office for settlement. Now, I have several other boats here if you want me to call them out, which unloaded their shrimp at other plants. No, this was oysters.

Q. Let's hear about oysters.

A. The vessel Sandra Nell, Exile Trahan captain, on April 13th unloaded oysters at Gulf Seafood, 1954. On April 16, 1954, the vessel Glennie Boy, Oliver Simmons captain, unloaded oysters at the Mavar Shrimp & Oyster Company. And the Glennie Boy again on April 29, 1954, unloaded oysters at the Mavar Seafood Company. I think that about covers all of these.

[fol. 254] Q. Covers those years—

A. —that are acceptable to the court.

Q. Now, when the settlement is made up on behalf of Williams Packing & Navigation Company, I believe you stated it was made by you, the settlement for the shrimp?

A. Yes, sir.

Q. And I believe you stated you gave the check to the captain?

A. Yes, sir.

Q. Have you done that along unless the crew men insisted that you have a check to them for their share?

A. Yes, that's right.

Mr. Morse: We offer in evidence this photostatic copy of the minutes of the annual meeting of the Williams Packing & Navigation Company held in Biloxi on September 15, 1955, which has incorporated a lease agreement covering a large number of boats from the partnership of DeJean to Williams Packing & Navigation Company, the lease agreement setting forth the terms of the lease entered into.

Mr. Nickman: The government agrees that it may be received and we stipulate that it is a true and correct copy of what it purports to be.

[fol. 255] The Court: Let it be marked.

(Same received and marked Plaintiff's Exhibit No. 26, which exhibit is copied here below.)

PLAINTIFF'S EXHIBIT #26

Minutes of the Annual Meeting of the Stockholders and Directors of Williams Packing and Navigation Company, Inc., at the Office of the Company in Biloxi, Mississippi, on September 15, 1955, as Provided by the Charter

There were present all stockholders and directors of the company. The stockholders and directors being identical, it was resolved that the meeting be joint.

Mr. Elmer Williams, President, presided at the meeting and Mr. Lucius Freiburger acted as Secretary of the meeting.

The following officers and directors were chosen to serve

for one year and until the annual meeting of September 15, 1956, to-wit: Elmer Williams, President; Carroll Williams, Jr., Secretary and Treasurer; Lucius Freiburger, Director.

The Secretary presented to the meeting a lease entered into on July 1, 1955, between Mr. Elmer Williams, President, and Elmer Williams, Carroll Williams, Jr., Mrs. [fol. 256] Cornelius Williams and Mrs. Ophelia Williams, d/b/a DeJean Packing Company, a partnership, relating to the leasing from the owners of the following boats, said lease being in words and figures as follows:

"For and in consideration of the sum of \$500.00 per boat, cash in hand paid, receipt whereof is hereby acknowledged, and other valuable considerations, receipt whereof also being hereby acknowledged, the undersigned hereby lease and let unto the Williams Packing and Navigation Company, Inc., a corporation organized and existing under the laws of the State of Louisiana, and domiciled in City of New Orleans, Parish of Orleans, State of Louisiana, the following described boats, to-wit:

Name:

Alma Mae, Brenda, Cal Williams, Connie Ann, Elmer Williams, Eustis McManus, Glenn Boy, Holiday II, [fol. 257] Irma Germaine, Jerry J. O'Keefe, Kay Ann, Mary Frances, Ophelia Williams, Peck Williams, Ronald, Jr., Reub Junge, Sad Sack, Sandra Nell, Standby

Together with all tackie, apparel, furniture, fixtures nets and equipment.

The term of this lease is for five years, beginning July 1, 1955, and ending June 30, 1960.

The said property so leased shall be used by lessee for the catching of shrimp, oysters and other sea foods. As a part of the consideration for this lease, it is specifically understood and agreed that said lessee during said period shall pay for all necessary repairs for said property, the [fol. 258] upkeep thereof, for all replacements except major equipment, and in addition shall pay all license fees necessary for the operation of said boats and all ad valorem taxes thereon. Lessor agrees to purchase and pay for all

ice used on boat operations and lessee agrees to reimburse lessor for one-half the cost thereof.

At the end of the period hereinabove specified, the lessee shall return to the undersigned lessors, the said property in its present condition, usual wear and tear and action of the elements excepted. The lessee further agrees that should the lessor sell or bargain to sell, any or all of said boats during the term of this lease, lessee will relinquish all rights hereunder with respect to such boat or boats upon notice from the lessor; and all parties hereto agree that the rental charge with respect to any boat or boats so sold by the lessor and released by the lessee shall be pro-rated over the period during which the lessee exercised his rights hereunder with respect to such boat or boats so sold; should lessors acquire other or additional boats during the lifetime of this lease, they shall be leased to lessee on the same terms and conditions as herein enumerated, without the [fol. 259] necessity of preparing a new lease therefor.

Witness our signatures this 1st day of July, 1955.

DeJean Packing Company, By: /s/ Elmer Williams
Partner, /s/ Carroll Williams, Jr. Partner, /s/
Mrs. Ophelia Williams Partner, /s/ Mrs. Cornelius
Williams Partner, Lessors.

(Mr. Morse continues)

Q. You are familiar with that lease agreement I just offered there?

A. I am. I haven't read it lately, but I am fairly acquainted with it.

Q. Since that lease agreement has been entered into, has the Williams Packing & Navigation Company been maintaining the boats and operating the boats as provided in that lease?

A. Yes, to the best of my knowledge they have.

Q. And has the rental been adjusted as between Williams Packing & Navigation Company and DeJean?

A. Yes.

[fol. 260] Q. And I believe that annual rental is \$600.00 per year per boat, is it?

A. Right.

Q. Now, the DeJean Packing Company and Williams Packing & Navigation company, are they both operating on a fiscal year basis?

A. Yes.

Q. When does the fiscal year end?

A. June 30th of each year.

Q. After that is an audit made of the books of each?

A. Yes, sir.

Q. After the fiscal year is over what is done to arrive at what profit the Williams Packing & Navigation Company gets for the fish that it sells?

A. Well, we negotiate with the partnership to see if we can get a little more money for them.

Q. And is an adjustment made at the end of the fiscal year to cover that?

A. Yes, sir.

Q. To cover that handling charge and what else do you call it?

A. It would be profit I suppose.

[fol. 261] Q. Profit. You have put it on the books, I believe, as a handling charge?

A. Yes. Well that is intended to be shown as a handling charge because that is a nominal amount that has been set up and that is a minimum profit that we will get and we negotiate, as I said, for additional if conditions justify.

Q. Have you checked into the financial condition of Williams Packing & Navigation Company, let's say, as of June 30, 1956, along with Mr. Lee Meyers?

A. Yes, sir.

Q. As of June 30, 1956, did the Williams Packing & Navigation Company have a surplus or a deficit, if you recall?

A. I don't recall. I have seen so many figures lately I just can't remember.

Q. I am sure that is true. Let's say as of September. From your general knowledge of the books as of September, I believe the 11th when this suit was filed, had the government levied and attempted to collect \$41,000.00 in taxes, [fol. 262] plus interest, what would have resulted to the Williams Packing & Navigation Company?

A. Well, in the first place we couldn't have paid it, didn't have any money. Would have just ruined us.

Q. Would it have put you in bankruptcy?

A. Yes, have to take bankruptcy or go out of business, one or the other.

Q. You don't know exactly whether they were a deficit company in September or not, do you?

A. I believe it was. I think I saw some figures that were worked up on it just recently. I don't remember just what they were.

Q. Have you and Mr. Meyers collaborated in working up these figures shown on this work sheet?

A. Yes, that is Mr. Meyers' handwriting and I took a picture of this for him, that is right.

Q. Examine this, Mr. Frieberger, and from your examination of it as a bookkeeper, as of June 30, 1956, what would you say the financial condition of the Williams Packing & Navigation Company was?

A. You mean as of August 31, 1957, that's what this sheet is.

Q. Yes. No, I am talking about '56.

[fol. 263] Mr. Nickman: I think that unless it is shown that this witness prepared this statement—

Mr. Morse: I agree with you that that is proper and I will withdraw that.

Mr. Nickman: —then we will insist upon the person who prepared—

The Court: Yes. He said he cooperated with Mr. Meyers in working it up.

Mr. Morse: I agree Mr. Meyers would be the proper person to ask about it.

Q. Of your own knowledge of the records and books when this suit was filed in September of 1957 would you say that the corporation was a deficit corporation and if the taxes that were levied were attempted to be collected what would the result have been to the corporation?

A. Well, it was a deficit corporation in '57 and it is still a deficit corporation, and if those taxes had been levied we would have had to—would have been bankrupt, no question about it.

Q. In other words, it was a dead horse already?

A. That is right.

[fol. 264] Q. During the years 1953, and 1954 and 1955

did any boat captains or any fishermen request you to withhold any social security taxes or to pay any withholding taxes or unemployment compensation taxes?

A. No, sir.

Mr. Morse: I believe that is all.

The Court: Very well, Gentlemen, I believe at this point we will take a recess until quarter until nine Wednesday morning.

(Whereupon the court recessed)

Wednesday, February 11, 1959, at 8:45 a.m. the hearing was resumed.

COLLOQUY BETWEEN COURT AND COUNSEL

By the Court: Mr. Morse, after you left the courtroom day before yesterday after court had adjourned, Mr. Guice called to my attention that a subpoena duces tecum had been issued requesting certain reports held by Matthew P. Lyons, Executive Director of the Biloxi Housing Authority, and these reports were then presented [fol. 265] to the Court for examination but not turned over to Mr. Nickman, as Mr. Guice objected on the ground that they were privileged. I examined them, and although some of them state that the information given will be held in strict confidence, yet I am of the opinion that the privilege does not apply and that they are not privileged, and I at that time did not rule, but I am ruling now on Mr. Guice's objection that they are not privileged, and Mr. Guice has just stated to me that he has reached the same conclusion, that they are not privileged. But I stopped the proceedings at that time because it was in your absence, and I wanted to give you an opportunity to see them and see whether or not you had any objections on behalf of your client of turning these documents over to Mr. Nickman for his inspection and use if he desired to use them. Have you seen them?

By Mr. Morse: I have seen part of them, Your Honor. I don't think we have seen all of them. Turning them over to him, we have no objection to that. I'd like to inspect them just a minute. We have no objection to turning them over to Mr. Nickman. We will have objection if [fol. 266] they are offered in evidence. We would like

to examine Mr. Matt Lyons about his knowledge about those records.

By the Court: When that question arises, I will permit you to do so, but at this time I am going to proceed with the testimony of Mr. Frieberger. But I will let Mr. Nickman have these documents now.

By Mr. Nickman: May it be understood that the Government received these documents temporarily for the purpose of having them photostated so the originals may be returned to the proper owners?

By the Court: Yes.

By Mr. W. L. Guice: Would it be objectionable for me to ask if Mr. Lyons could go until a certain time? He is a very busy man.

By the Court: Any objections to that?

By Mr. Nickman: No, sir.

By the Court: Yes, Mr. Lyons may go, and if he is needed he will be called.

Cross-examination of Mr. Frieberger.

By Mr. Nickman:

Q. Mr. Frieberger, you testified that you have been [fol. 267] employed by the DeJean Packing Company since 1938 in the capacity of office manager and bookkeeper. Now, what was the nature of your business and professional training prior to that time?

A. I was graduated from Soule College in New Orleans, which is a business school, and after I graduated I taught bookkeeping, accounting, business arithmetic, and so forth for a period of about 3½ years. I also completed a portion of the LaSalle Extension University course in accounting.

Q. At the completion of that course, did you immediately go to work for the DeJean Company?

A. I did not say that I completed the LaSalle course. I said a portion of it.

Q. At the time you completed that portion, did you then go to work for the DeJean Company?

A. Yes, I would say.

Q. Were you at any time associated or connected with firms of accounting?

A. No, sir.

Q. These courses that you took, did they concern themselves with the preparation of Federal income tax returns? [fol. 268] A. No, sir.

Q. Have you had any experience whatever with the preparation of Federal income tax returns?

A. Nothing other than what I have read and studied up on by actually looking at returns and so on.

Q. Have you discussed any matters involving Federal income tax returns with the accountant, Lee Meyers?

A. It is possible that I have. I can't recall of any situation right now.

Q. Do you furnish Lee Meyers with the information and data which are necessary for the preparation of the partnership returns filed by the DeJean Packing Company?

A. Mr. Meyers obtains the information from the books and records of DeJean Packing Company.

Q. Does he discuss with you any of the information necessary to make up that return?

A. In the course of an audit I imagine he would.

Q. Do you bring to his attention the fact that DeJean Packing Company is a partnership?

A. Yes, sir. He knows it's a partnership.

[fol. 269] Q. Do you bring to his attention the existence of any other partnerships that may exist in the organization?

A. I don't know of any other partnerships.

Q. Isn't it your position in this case that the DeJean Packing Company—or rather the Williams Packing & Navigation Company—I'm getting confused myself there are so many companies here—Isn't it your position that the Williams Packing & Navigation Company is engaged in a joint venture with the fishermen? Isn't that the position you people have in this case?

A. That's true.

Q. Well, I should like to read you, Mr. Frieberger, the definition of a partnership in the Internal Revenue Code and ask you whether you happen to be familiar with this. Section 761A of the 1954 Internal Revenue Code, says this: "For the purpose of this sub-title the term 'partnership' includes a syndicate, group, pool, joint venture, or other

unincorporated organization through or by means of which any business, financial operation or venture is carried [fol. 270] on and which is not within the meaning of (this sub-title, a corporation." Are you familiar with that?

A. No, sir.

Q. Have you ever discussed that with Mr. Meyers?

A. Not to my knowledge.

Q. Are you aware of the fact that all partnerships are required by law to file a partnership information return?

A. I know that there is a partnership information return filed.

Q. Is it my understanding that you do not concern yourself with these matters?

A. No, sir. I do not concern myself with those matters. We rely on our accountant.

Q. On who?

A. Accountant.

Q. I thought you were in charge of all the records of the business?

A. I do not prepare income tax returns.

Q. But you do furnish the information to Mr. Meyers?

A. Furnish the books and records to Mr. Meyers for his inspection and analysis and—

[fol. 271] Q. Did you ever tell Mr. Meyers—

By Mr. Morse: Let him finish his answer.

A. —I turned the books and records over to Mr. Meyers for audit, and for analysis and evaluation of the accounts for income tax purposes, but do not assist Mr. Meyers in preparing the income tax return.

Q. Have you finished your answer?

A. Yes.

By Mr. Morse: (to witness) Go ahead and finish your answer when he asks you a question.

By the Witness: I'm finished.

Q. Have you ever told Mr. Meyers that the Williams Packing & Navigation Company is supposed to be engaged in a joint venture with the fishermen?

A. I don't recall ever having told him that in so many words. But it's common knowledge.

Q. Whose common knowledge?

A. Everyone's.

Q. Do I understand your statement is that he knew that?

A. I think he did.

Q. You say he knew that?

[fol. 272] A. I think he did.

Q. Did he ask you that at any time?

A. I don't recall him asking me that.

Q. You testified on Monday that the books and records which both of these companies keep are the kind which are consistent with good accounting practice. Is that correct?

A. In my opinion they are.

Q. Do you keep a completely independent and separate set of books for each company?

A. In my estimation they are.

Q. Is it possible to arrive at a complete understanding of every single transaction conducted by the Williams Packing & Navigation Company by limiting your examination to just the records of Williams Packing & Navigation Company?

A. I understand them, Mr. Nickman. I don't know about you or anyone else.

Q. Do I understand that every single transaction can be understood thoroughly by examining the books of Williams Packing & Navigation Company without resorting to any inspection of DeJean Packing Company's books?

[fol. 273] A. There may be certain records that would have to be referred to DeJean's books.

Q. What would those items of entry be?

A. Well, the expenses for the boats which DeJean pays as the boats are repaired and maintained, and those records are kept in a separate ledger, and at the end of the fiscal period those accounts are checked and evaluated and then the expense items are charged to Williams.

Q. Whose ledger do these entries appear upon?

A. They appear on DeJean's ledger.

Q. So that there is no separate subsidiary ledger for the Williams Packing & Navigation Company on that, is there?

A. Not for the expense items, no, sir.

Q. Isn't it a fact that you post certain entries from the journal of Williams Packing & Navigation Company to a subsidiary ledger of the DeJean Company?

A. If you'll excuse me, I lost track right there.

A. I'll repeat it. Isn't it a fact that you post certain entries from the journal of Williams Packing & Navigation Company's books to a subsidiary ledger, not of Williams Packing & Navigation Company's books, but a subsidiary ledger of DeJean's Packing Company's books.

By Mr. Morse: Will you define subsidiary ledger to him, Mr. Nickman?

By Mr. Nickman: Well, now, Mr. Frieberger has testified to his experience and knowledge of these books. I think he knows what books I'm talking about.

By Mr. Morse: If you know what a subsidiary is—

A. Oh, I know what a subsidiary is. But do I understand you to say, are certain items from DeJean's journal posted to a DeJean ledger?—Well, certainly they are.

Q. You post certain items from the journal of Williams Packing & Navigation Company books to a subsidiary ledger of DeJean Packing Company's books?

A. Yes, sir, certain items that are collected for the account of DeJean.

Q. Well, how is it possible by limiting one's self to just the Williams Packing Company's books to determine what [fol. 275] the transactions are without looking at the DeJean Packing Company's books?

A. Mr. Nickman, you had access to those books.

Q. That isn't the answer to my question. You testified that each of these sets of books is a completely separate and entirely distinct set of books.

A. They are.

Q. And that it is possible to determine a transaction by looking at all of one set of books. Now, on January 17th at a hearing before this court, Mr. Morse asked you whether the transactions between the DeJean Packing Company and the Williams Packing Company was one operation or whether it was a business relationship at arm's length, and you said, and I quote, "Well, it is two different com-

panies." What is your idea, Mr. Frieberger, of an arm's length transaction?

A. I don't know what you mean by an arm's length transaction, but I know that they are two separate companies. One is a corporation and the other is a partnership.

[fol. 276] Q. Let me ask you this: Is it your idea that keeping a set of books and a paper charter of a corporation automatically separates a company at arm's length from another company?

A. What do you mean by a paper chart?

A. I don't answer the questions. I only ask them.

Q. I don't understand your question. If I don't understand what a paper chart is—

Q. Charter. C h a r t e r.

A. I understand what a charter is. It's a legal corporation and the partnership is a legal partnership.

Q. And you regard that on that basis alone as being an arm's length transaction, on that basis alone?

A. No, not on that basis alone. Two different companies engaged in different operations.

Q. You have testified that you while acting for the Williams Packing & Navigation Company paid the Louisiana severance tax. Is that correct?

A. Yes, sir.

Q. When do you pay these taxes.

A. Monthly.

Q. You have also testified that while acting for the Williams Packing & Navigation Company that you buy the catch from the fishermen after each trip. Is that correct?

A. That's right.

Q. Are you familiar in any way with the law of Louisiana regarding the severance tax?

A. I think I have a working knowledge of it.

Q. Aren't you aware of the fact that under Louisiana law your fishermen do not get any title to that fish because under the law of Louisiana the title to the fish continues in the State of Louisiana until the severance tax is paid?

By Mr. Morse: We object to that, Your Honor, as being a matter of law.

Q Mr. Frieberger—

By Mr. Morse: Let me have a ruling, and I wish you wouldn't go forward until after I complete my objection.

By Mr. Nickman: Very well.

By the Court: The question was whether he was familiar with that law.

[fol. 278] By Mr. Nickman: And he said that he was.

By the Court: Well, I will overrule the objection. It has already been answered.

Q. Mr. Frieberger, do any of the fishermen working on company-owned boats of the Williams Packing & Navigation Company pay any of these severance taxes?

A. No, sir, not to my knowledge.

Q. Do any of the fishermen working on Williams Packing & Navigation Company boats pay any license fees to the State of Louisiana?

A. Not to my knowledge.

Q. Who pays all of these fees?

A. Williams Packing & Navigation Company.

Q. Mr. Frieberger, how much money is due right now to the Williams Packing & Navigation Company from the DeJean Packing Company?

A. I don't know.

Q. You don't know what the accounts receivable are?

A. No, sir.

Q. Now, you have testified that the DeJean Packing Company pays the Williams Packing & Navigation Company from time to time. Is that correct?

[fol. 279] A. I said that they made payments on account from time to time.

Q. On account from time to time. Now, will you please tell us who decides when these payments are to be made.

A. I suppose I do.

Q. You make the decision?

A. Yes, sir.

Q. Who decides how much is to be paid?

A. I do.

Q. Do you make that decision alone or do you make it in consultation with someone else?

A. I make my decision alone.

Q. You do not discuss it with Mr. Williams?

A. No, sir.

Q. How do you determine how much and when you should pay it.

A. I have no set rule for that.

Q. You have no set rule?

A. No, sir.

Q. Then isn't it within your power to determine how much money should go from the DeJean Company to the Williams Packing & Navigation Company?

[fol. 280] A. Would you repeat that question, sir?

(Question read by the reporter.)

A. That's within the scope of my work.

Q. Now, Mr. Frieberger, there is in evidence a copy of the current lease agreement which is in effect with respect to some 19 boats purported to have been leased by DeJean Company to the Williams Packings & Navigation Company. I invite your attention to the current lease agreement dated July 1, 1955, which purports to be effective for a period of 5 years and ask you to look at the first two lines of the agreement.

A. This part which you have underlined?

Q. Yes. Will you please read that?

A. (Reading) "For and in consideration of the sum of six hundred dollars per boat" and this part is underlined, "cash in hand paid, receipt whereof is hereby acknowledged and other valuable considerations."

Q. How many boats were purported to have been leased under that agreement?

A. There are 19 on this list.

[fol. 281] Q. 19 boats, each leased at the amount of \$600 a boat would be a total of how much, Mr. Frieberger?

A. That would be around \$11,400.00.

Q. \$11,400.00. Now, this lease, purported lease, was signed on July 1, 1955, and I will ask you whether on that date cash was actually paid of \$11,400.00.

A. I don't remember particularly whether the cash was actually paid on that date or not.

Q. Wouldn't your books show whether it was paid?

A. They will.

Q. Do the books show it?

By Mr. Morse: The books are the best evidence.

A. That's right.

Q. Do you have the books in court?

A. They're locked up in the cell block.

Q. I will ask you to return at your convenience and produce those books and show us whether or not that sum was paid. You don't remember whether it was paid?

A. I would rather refer to the books and see if they were paid.

[fol. 282] Q. If it was paid, would you say it was paid by cash or by check?

A. All business is transacted by check.

Q. When you say "all business," you mean all items of business by Williams Packing & Navigation Company?

A. Yes, sir.

Q. I thought you testified on Monday that there were some cash payments.

A. Our particular business, our payments, so forth, are by check. If we receive cash, that's a different situation.

Q. I thought you said all the business is done by cash.

A. You're twisting my words around, Mr. Nickman.

Q. Mr. Frieberger, what can you tell us, if anything, about any oyster leases that are held either by Williams Packing & Navigation Company or by the DeJean Packing Company on oyster beds in the waters of the State of Louisiana.

A. I have just general knowledge and understanding of the arrangement for leasing. As far as I know only the Williams Packing & Navigation Company leases oyster [fol. 283] bedding grounds. Now, my understanding of that is this: That in order to dredge for oysters in the State of Louisiana, it is necessary to lease from the State of La. so many acres of land per boat that will dredge. And that fee, whatever it is, is paid to the Louisiana Department of Conservation agent who has an office here in Biloxi.

Q. Now, Mr. Frieberger, my question was not asking you give a dissertation on the law of Louisiana. I asked

you whether or not you can tell me about any oyster leases that are actually held by either of these two companies. Now, are there such leases?

A. Do you mean written leases?

Q. Any kind of leases actually held by these two companies.

A. They would have to be written to be held.

Q. Have you ever paid any rent for such leased ground?

A. I have.

Q. You have.

A. Yes.

Q. Do your books show that either of these two companies has ever actually paid rental for leasing such oyster [fol. 284] grounds?

A. I feel sure that the Williams books will show where a fee was paid for bedding ground.

Q. I didn't ask you about any fee. I asked you whether or not your books will show that you have paid rental on leases of regular leased oyster beds.

By Mr. Morse: We submit that the records will speak for themselves, and every one of the records is locked up here and if he wants to point out to him what record he wants, Mr. Frieberger will go in there and attempt to bring it out and explain it.

By the Court: I will overrule the objection to this extent: If he remembers or knows, he can say he does, but if he prefers to look at the books I'll give him opportunity later on to look at the books and see if the books so show. I will let him answer whether or not he remembers any fees were paid to the State of Louisiana for the leasing ground. Do you remember off-hand?

A. By the Witness: Yes, sir, that is my understanding of what that payment was for, for the leasing of bedding grounds.

[fol. 285] Q. Do you know whether or not these areas which are supposed to be leased beds in Louisiana have ever been staked out by either of these two companies?

A. I don't know if they were actually staked out. I don't believe that is necessary to actually stake out the areas on a natural reef.

Q. Mr. Frieberger, I didn't ask you whether it is or isn't necessary. I asked you whether you know whether it was staked out.

By Mr. Morse: Answer him yes or no, Lou.

A. No, sir, I don't know.

Q. When I asked Mr. Williams whether he knew anything about these oyster beds he testified that you know the answers to all of these questions.

A. Well, Mr. Williams what he meant by that was for the payment of those leases or rentals, whatever you want to call them.

Q. Isn't your answer that you don't know whether either of these companies actually has an oyster lease?

A. Well, we do, Mr. Nickman, that's what we pay the fee for.

[fol. 286] Q. But you don't know whether you stake it out?

A. I don't know if we stake it out and further I don't know if it's required that we stake it out.

Q. Mr. Frieberger, on cross examination by me of Mr. Williams, I asked him if the Williams Packing & Navigation Company owned any boats, and he said you know all about that.

A. That's right.

Q. Suppose you tell us about it.

A. The Williams Packing & Navigation Company did at one time own two boats, The Robert B. Favret and the Jim Eastland.

Q. When did it own them?

A. I don't remember the date.

Q. When did it get rid of them.

A. I don't remember the date.

Q. When I asked Mr. Williams about these two boats he said, on page 58 of the transcript, that you know all about this.

A. Mr. Nickman, I'm not going to attempt to give you any dates from memory and then have you throw them back in my face. I would rather look at the books and refer to [fol. 287] the dates.

Q. Do you know anything about the acquisition and disposition of the two boats.

A. Yes, I know something about it.

Q. Suppose you tell us about it.

A. What do you want to know?

Q. I want to know everything about it. I want to know why these boats were gotten rid of, under what circumstances, and at the time this case was under investigation that they were gotten rid of. Now, you tell us about it.

A. Pardon me. Do you say they were gotten rid of when this case was under investigation?

Q. I say they were gotten rid of at the time this investigation was first started.

By the Court: Very well, gentlemen, don't argue.

(To witness) Do you know when the boats were gotten rid of?

By the Witness: No, sir, I don't know the date, but—

By the Court: Can you find out?

By the Witness: Yes, sir, I can look at the record.

[fol. 288] By the Court: Very well. Later on you can get that information.

(To counsel) Any other question you want to ask about details? I don't want to cut you off.

By the Witness: I can answer some of the questions he asks me if he will ask me one at a time.

Q. Suppose you tell me where you got the money to buy the boats in the first instance.

A. If my memory serves me right, Williams had some money of its own, and the balance was borrowed from the Peoples Bank, and a mortgage was given to the Peoples Bank. The mortgage was recorded in the Custom House.

Q. How much did the boats cost?

A. I would have to look at the records for that.

Q. Are the records available in the court?

A. No, sir.

Q. Where are they?

A. Mr. Meyers our auditor may have some working papers on that to show.

Q. I suggest you and Mr. Meyers discuss this matter for further examination.

[fol. 289] A. All right.

Q. Did the Williams Packing & Navigation Company construct these boats?

A. No, sir.

Q. Who constructed them?

A. I believe that both of the boats were built by DeJean Packing Company in their shipyard.

Q. Built by DeJean Packing Company?

A. I think so.

Q. Now, when they were built by the DeJean Packing Company, how did they get into the ownership of the Williams Packing & Navigation Co.?

A. They were sold to Williams.

Q. They were sold to Williams?

A. Yes, sir.

Q. Do you know the circumstances underlying the sale?

A. Do you mean why they were sold?

Q. Why and how they were sold.

A. Williams wished to acquire—had a little surplus and wished to acquire some boats.

Q. Williams had a surplus?

A. I think they did.

[fol. 290] Q. Do you know how much that surplus was?

A. No, sir.

Q. Now, on the hearing on January 17, 1959, Mr. Morse asked at Page 11 of the transcript whether the Williams Packing & Navigation Co. can lease boats, and you testified that the Williams Packing & Navigation Co., and I quote, "can lease from anybody." Now, as a matter of fact, did the Williams Packing & Navigation Company ever lease boats from anyone else other than the DeJean Packing Company?

A. No, sir, but there's no reason why they couldn't.

Q. But they never did?

A. No, sir.

Q. Now, on cross examination on Monday by me of Mr. Williams, I asked him about the DeJean Packing Company, Inc., a corporation of the State of Mississippi, and he said that you know all about this. So will you please tell us all about it?

By the Court: Was that the Williams Packing & Navigation Company, the Mississippi corporation, or the DeJean Packing Company?

[fol. 291] By Mr. Nickman: DeJean, Your Honor.

By the Court: That's what I thought.

By Mr. Morse: We want to interpose an objection. We are confined by our pleadings to the years 1953, '54 and '55. We were confined the other day on introducing the charters by Your Honor for those years. Now, we submit if this was prior to 1953, '54 or '55 that in the basis of Your Honor's ruling it would be incompetent, irrelevant and immaterial. Other than that we have no further objection to it.

By the Court: I think probably this would be relevant. I will anyway overrule the objection. It probably is competent upon the theory of the Government in this lawsuit, so I believe I will let him answer it.

Q. Please answer the question.

By the Court: Suppose you repeat the question, because you asked about Williams, and as a matter of fact as I recall Mr. Williams' testimony it was the DeJean.

By Mr. Nickman: You are correct. I stand corrected.

By the Court: What was your question.

[fol. 292] Q. My question was, on cross examination by me of Mr. Williams on the hearing on Monday I asked him about the DeJean Packing Company, Inc., which was a corporation of the State of Mississippi, and he said that you know all about this, that he doesn't. So would you please tell us about it?

A. There was a DeJean Packing Company, Inc., years ago. I believe that it was dissolved some time around 1943, and at that time the present partnership was formed. All of the details concerning that dissolution and the formation of the partnership were handled by an attorney.

Q. Do you know anything about the nature of the activities of that former corporation, what did they do?

A. They were processors and so forth of canned shrimp, canned oysters, and distribute it.

Q. Did they do any fishing?

A. I presume they did.

Q. Do you know?

A. There was certainly some shrimp and oysters brought [fol. 293] in, and I don't recall right now whether there was any other Louisiana corporation or anything else like that. It may be that this Mississippi corporation

was qualified to do business in the State of Louisiana, I don't know.

Q. Well, this corporation was dissolved you say some time in 1943?

A. I believe that was the date.

Q. Now, when was the Williams Packing & Navigation Company organized?

A. I think it was actually began operations about 1944 and probably it was organized shortly prior to that. I don't know off-hand.

Q. In between the time of the dissolution of the DeJean Packing Company, Inc., and the formation of the Williams Packing & Navigation Company, the fishing was being done by the partnership, is that correct?

A. I wouldn't be sure about that. I don't know what date the charter was actually surrendered or anything like that.

Q. Well, there was no other in-between corporation during that period, was there?

[fol. 294] A. Oh, no. In other words, I don't know if there was a clean break and then there was another period in between; I don't know off-hand. I don't know where I would find the information on something that far back.

Q. Mr. Williams said he didn't know anything about it and you know all about it.

By the Court: Suppose you just ask him the questions, Mr. Nickman.

By Mr. Nickman: Yes, sir.

Q. Now, you testified on Monday when Mr. Morse asked you this question that the catch boats during the time you had the freight boat system, that these catch boats owned by Williams did not necessarily unload on freight boats of Williams. Is that correct?

A. That's correct.

By Mr. Morse: Wait a minute. He said "catch boats owned by Williams."

A. That's not right. He means boats leased by Williams.

[fol. 295] By Mr. Morse: Watch those trick questions on him, Lou.

Q. The catch boats owned by DeJean and purportedly leased to Williams you say did not necessarily unload on freight boats of Williams. Is that correct?

A. That is correct.

Q. Now, isn't it a fact that when a Williams freight boat was available that the catch boat was expected to unload in a Williams freight boat?

A. Seems to me that would be the normal procedure.

Q. Now, isn't it also a fact that when fuel is not obtained from a company-owned pump on the docks of your companies—and you spoke of such situations where fuel was not obtained from those docks—isn't it a fact that in those situations you were discussing independent boats?

A. Not necessarily, M. Nickman. There have been some occasions, although I cannot recall which specific cases, but there have been some occasions I know where it was necessary or desirable for the boats to fuel, take on fuel, [fol. 296] somewhere else other than the docks at the plant.

Q. If the boats are located in Biloxi, don't they always get their fuel at the docks?

A. I would say yes to that.

Q. And these situations, these very rare situations that you speak of where the men may get fuel away from the docks, they are special situations like emergencies and so on, are they not?

A. They could be.

Q. Mr. Frieberger, does the DeJean Packing Company furnish any financial statements to organizations like Dunn & Bradstreet or other credit reporting organizations?

A. Yes.

Q. Have you given statements to such organizations indicating that the amount of business done by DeJean Company in 1952 was about two million dollars?

A. I do not have copies of those statements, and I wouldn't recall that.

Q. Do you know yourself whether DeJean Packing Co. did a business in 1952 of approximately two million dollars? [fol. 297] A. I don't recall. I would have to look at the record.

Q. Well, we'll take up a more recent date.

A. All right.

Q. Do you know whether or not the DeJean Packing Company did or did not do a business in 1958 at the end of that calendar year of \$2,589,000.00?

By Mr. Morse: We make the same objection.

By the Court: Yes, sustain the objection.

Q. Do you know what the net worth of the DeJean Packing Co. was at the end of the calendar year 1958?

By Mr. Morse: Same objection.

By the Court: Sustain the objection.

Q. Now, Mr. Frieberger, on Monday I asked Mr. Williams whether or not the fishermen were paid for painting the superstructure of the fishing trawlers, and he said if they were it would be shown on the books. Do you know of your own knowledge of the books whether such payments were ever made?

A. I can't recall any specific instances.

[fol. 298] Q. Do you know whether or not any of the fishermen were ever paid for building or rebuilding any portion of the property of these companies which was destroyed in the hurricane of 1947?

A. No, sir, I don't know. That's back in 1947, I believe. That's a long time to try to remember something.

Q. Do you know whether or not the books would show that such payments were made?

By Mr. Morse: We object to that and ask that he confine himself from '53 through '55. That is what the issues are in this case.

By the Court: Yes, sustain the objection.

By Mr. Nickman: May I state for the record, Your Honor, that this question was answered by Mr. Williams in which he made a certain statement with respect to this aspect. We would like the record to show that we are attempting to attack the credibility of the witness Williams.

By the Court: It is on an immaterial matter, and I sustain the objection.

By Mr. Morse: You don't believe anybody.

[fol. 299] By the Court: Let's don't have any side remarks.

By Mr. Nickman: I beg to strike the remark.

By the Court: Yes.

By Mr. Morse: Yes, I beg Mr. Nickman's pardon, and I'll try to keep my tongue in the future.

By the Court: Very well. You may proceed.

Q. Mr. Frieberger, has the DeJean Packing Co. or the Williams Packing & Navigation Company, either one, issued any financial statements to banks, commercial banks?

By Mr. Morse: We object unless he confines it to the years '53, '54 and '55. "Have they ever done it" covers a—

By the Court: Yes, sustain the objection to it.

Q. Have you issued financial statements of either of these companies for either the years 1943, '44—1953, '54, and '55?

A. I think I did.

Q. Can you tell us the names of those banks?

A. The Peoples Bank of Biloxi.

[fol. 300] Q. Have you issued such statements on behalf of either company during the same years to any assurance companies or underwriting companies?

A. I may have.

Q. With respect to the years 1953, '54 and '55, have you issued any statements prior to that time which would affect or could be interpreted as having effect for such years of 1953, '54 and '55?

A. I may have.

Q. Now, you testified on Monday at some great length about so-called outside sales. Do you know personally anything about the basis or the reason for these so-called outside sales?

A. All I know is that they were sold outside and either the cash, and some instances check, was brought into the office in settlement.

Q. And you don't know anything about the special circumstances as to why the sales were made?

A. I can assume, but that wouldn't be first hand knowledge.

Q. Now, you brought into court on Monday a number of books that contain all these share slips for the years 1953, '54 and '55. Isn't it a fact that Revenue Agent Price and [fol. 301] myself have repeatedly asked you for those books and you never produced them? You said they were destroyed?

A. I did not say they were destroyed. I said that I'd not been able to find them. And it was due to the fact that you insisted on me bringing certain books in here by subpoena on Mr. Williams, I crawled up in the attic and I worked all day Saturday looking for the books and records you requested, and I found some of these old share slip books in a box covered up with some other papers. Otherwise, I never would have found them. If you recall, when you were in our office I told you that I had some share slip books and would like for you to look at them, and you didn't even raise your eyes from off the papers you were looking at to give me the courtesy to pay attention to me.

Q. Did you ever show any of them to me?

A. I told you I had them and available to you, and you said, "I'll see them later," and you never asked me for them.

[fol. 302] Q. Did Investigator Price visit you prior to the trial when the investigation was under way and ask you for the share slips?

A. He did and I couldn't find them.

Q. Didn't you tell him they were destroyed?

A. I don't recall saying they were destroyed. I said I couldn't find them.

Q. Now, how many share slips does each of those books contain, approximately?

A. Approximately 50. Anywhere from 45 to 50, I would say.

Q. Wouldn't you say that all three books contain approximately a thousand transactions?

A. All three books?

Q. For all the years.

A. The books for—? I think that estimate is a little high.

Q. What is your estimate for all of these, of all the transactions in—

A. —Well, let me see.—Yes, you're about right. Probably about a thousand transactions for a period of three years. I'm sorry. You are about right.

[fol. 303] Q. And how many transaction-, rather the number, did you recite here on Monday?

A. I don't remember the number I recited. They're all on the desk there. We can count them if you care to.

Q. Did the Williams Packing & Navigation Company have a pilot cat food plant prior to the installation of its regular plant?

By Mr. Morse: We object to that. It's been shown that that was started last year.——

By Mr. Nickman: I——

By Mr. Morse: Just a minute, if you'll be quiet. That's what gets me riled up, I guess, when you start up like that.

By the Court: I will hear you.

By Mr. Morse: We object to that because it's been shown the cat food only started last year, and the issues in this case cover '53, '54 and '55.

By Mr. Nickman: May I be heard.

By the Court: I'll overrule the objection.

A. Will you repeat the question. I think you got something a little wrong.

[fol. 304] (Reporter reads last question)

A. No, sir. The Williams Packing & Navigation Company did not.

Q. Never had a pilot plant?

A. No, sir.

Q. When was the first time that trash fishing was engaged in by Williams Packing & Navigation Company?

A. I don't know.

Q. You don't know? Who does know?

A. Well, we would have to look at the record, Mr. Nickman, I can't go from memory on everything.

Q: Do you know who does know?

A. We can look at the records, at the books.

Q. Will you please look at the books at your first opportunity and return to give us testimony.

By Mr. Morse: You had better write down all these things he is asking you to look at. We can try to make a note of it.

By the Court: The question was——

By Mr. Nickman: The question was when the company first started engaging in trash fishing activities.

By Mr. Morse: That's Williams?

[fol. 305] By Mr. Nickman: Williams.

By the Court: Yes, Mr. George Morse, I suggest you make a memorandum of these things to look up. The one I remember was when the boat Jim Eastland was disposed of.

By Mr. Nickman: One was the matter of the existence or non-existence of leases, leased oyster beds; a second one was the payment or non-payment of any actual rentals on such leases or oyster beds.

By Mr. Morse: Go a little slower so we can get them.

By the Court: Very well, I suggest we proceed and we'll take a 10 minute recess in a few minutes so you can get the memorandum. So you may proceed, Mr. Nickman.

Q. Mr. Frieberger, I hand you a group of bank statements, being statements of the account at the Peoples Bank of Biloxi, of the Williams Packing & Navigation Company, Inc., and I ask you to rifle through these and observe whether or not there are not entries here in red of varying amounts at various times.

A. Yes, sir.

[fol. 306] Q. From your knowledge of the operations of this business and in connection with your activities keeping the records and so forth of this business, isn't it a fact that these red entries on each of these statements represents a bank overdraft?

A. Yes, sir.

Q. What arrangements do you have with the Peoples Bank of Biloxi with regard to taking care of these overdrafts?

A. The only arrangement that I have is with the bookkeeper that he will not turn down or send back any checks because of insufficient funds without first notifying me.

Q. Who do you make the arrangement with?

A. With Mr. Walker Tucei.

Q. What is his capacity?

A. He is the bookkeeper at the bank, head bookkeeper.

Q. Did you ever have any discussions with anybody else at the bank regarding the honoring of these overdrafts?

A. I don't believe I did.

[fol. 307] Q. Do you know whether or not Mr. Williams had any discussions with any officer or person at the bank regarding the honoring of these overdrafts?

By Mr. Morse: We object to this. It is certainly irrelevant and immaterial to the issues in this case.

By the Court: Well, I will overrule the objection if he knows whether Mr. Williams—of his own knowledge—whether Mr. Williams had any agreement with any of them.

By the Witness: Your Honor, I would answer that in the negative, because Mr. Williams leaves all of that up to me.

By the Court: The question was, do you know of any?

By the Witness: No, sir, I don't.

Q. Mr. Frieberger, isn't it a fact that the Williams Packing & Navigation Company makes certain bonus payments to the fishermen?

A. That's right.

Q. Have you ever had any conversations with any of the captains concerning their leaving the service of the company?

[fol. 308] A. It's possible that I have.

Q. Isn't it a fact that you have told at times certain captains to remove their clothes from the ship?

A. It is possible that I did do that during the recent strike and during the month of May or June or something like that.

Q. Is that the only time you ever said that to a captain?

A. To the best of my knowledge and belief, yes, sir.

By the Court: In order to save time in the future, I foresee what possibly could happen; the questions are thoroughly competent touching his knowledge and memory, etcetera, but if you intend to impeach the witness, you know the rule on impeachment is that you have to name the time, place and circumstance. So in order not to have to bring him back, if that question is for the purpose of impeachment, I just call your attention it has not been properly phrased, and when you undertook to impeach him I could readily sustain an objection because the predicate was not laid. But it is my custom to be liberal in those things and let you recall the witness in order to lay a predicate for impeachment purposes. I am calling your [fol. 309] attention to that at this time. If you intend to impeach him, you have not laid the proper predicate.

By Mr. Nickman: We will follow the accepted practice at the proper time.

By the Court: I may follow the practice now if you don't lay it now, that I am not going to let you recall a witness to lay a predicate to impeach a witness.

Q. I hand you Plaintiff's Exhibit No. 4, being a photograph, an aerial photograph, and ask you to inspect this photograph and tell us what it represents to you.

A. This appears to be an aerial photograph of the DeJean Packing Company plant.

Q. Would you please place a circle with this pen I hand you around the entire area covering the operations of the DeJean Packing Company and the Williams Packing & Navigation Company on that photograph?

A. You are referring to these buildings?

Q. All the buildings and property in that photograph.

(Witness marks)

[fol. 310] A. I'm marking that because it is property of the DeJean Packing Company, but it's not used in the operation. This is a *cervice* station there. This outline here is an outline of all the buildings and land and property of the DeJean Packing Company that I can see in this photograph.

Q. Well, now, Mr. Frieberger, I invite your attention to the far right side of that photograph, you will notice in ink an X upon the roof of that building placed there by Mr. Williams. Is that or not within the same group property?

A. No, that is the property belonging to C. C. Company that is known as Toche Shipyard. Mr. Williams was confused.

By the Court: Talk a little louder.

A. This X is on the roof of what used to be known as the Toche Shipyard. It's property belonging to C. C. Company. Mr. William Cruso.

Q. Then the X placed by Mr. Williams was not correct. Is that correct?

A. That's right.

[fol. 311] Q. Now, this area you have just enclosed in ink, is there any other activity carried on in this area which is

not concerned with the catching, processing, and marketing of seafood products?

A. There's a machine shop and an oil dock.

Q. Well, this machine shop and this oil dock, these particular facilities, are they not used in connection with the activities of the company? In other words, Mr. Frieberger, isn't this area which you have just enclosed all part of an integrated operation?

A. I don't know just what do you mean by integrated operation?

A. Isn't each one related to the other? In other words, Mr. Frieberger, to assist you, for example, you don't carry on any shoe manufacturing business there or no candy making business. Everything is related to this one type of business. Am I correct?

A. Well, these buildings here aren't canning operations proper, that is true. This building over here is the machine shop where the engines on the boats might be overhauled or where some work may be done to maintain the equipment [fol. 312] in the plant. And this oil dock here, that is nothing to do with canning—

Q. But it has something to do with the seafood portion and activities of the business in general, does it not?

A. I would say it did.

By the Court: Take a 10 minute recess.

(Whereupon the Court recessed for ten minutes.)

After Recess

(Mr. Nickman continues cross examination:)

Q. Mr. Frieberger, have you had an opportunity to consult your books with reference to some of the questions that have come up this morning?

A. Yes, sir, I have.

Q. Are you able to ascertain whether or not there has ever been a cash payment of \$11,400.00, with specific reference to the alleged payment of rents on the nineteen boats of the DeJean Company?

A. No, sir, I haven't been able to find where any check was issued in that sum. However, there are adjustments

[fol. 313] at the close of the fiscal year whereby the rent due DeJean is set up in the accounts payable.

Q. In other words then, the portion of the lease which you read, in which it says "cash in hand paid," no such payment was made?

By Mr. Morse: That is a question of law, we submit. Adjustment can be made, which is regarded as payment.

By the Court: I overrule the objection.

Q. Was any such cash payment made?

A. I couldn't find any.

Q. Have you been able to determine from the examination you made just now of the records when the trash fishing activities were commenced?

A. Please repeat the question.

Q. Have you been able to determine from your examination now of the books within the past 15 minutes when the trash fishing activities of the company was commenced?

A. No, sir, I didn't have sufficient time to delve into the records to determine the actual beginning date of operations for trash fishing. That has been some time back, [fol. 314] some few years ago.

Q. Would you be able to take a position in fixing some time approximately as to whether or not trash fishing activities did not occur at some time either prior to or during the years '53, '54 and '55, whether there were any trash fishing activities prior to or during those years?

A. I'll say that it is possible that it was during those years.

Q. In other words, you will not deny that there could have been such trash fishing activities?

A. Yes.

Q. Would anybody else know—

A. I mean I do not deny it.

Q. Would anybody else besides you know about this fact?

A. Possibly, but they would have to go from memory. The best way to do is to look at the record and see if and when we did get any fish during that particular period.

By the Court: Very well, gentlemen. Let's get into something else and let him look into the record and come back on the stand tomorrow.

[fol. 315] Q. Have you determined from your examination of the books whether or not Williams Packing & Navigation Company had any oyster leases for regular leased beds?

A. Yes, sir. In the brief time I had, I found where on Dec. 31, 1953, Williams Packing & Navigation Co. check No. 977 was issued to James N. McConnell in the sum of \$143.00 for oyster bedding grounds, and there were two other checks just prior to that; one in Nov. of 1952, check No. 10574 issued to Mr. James N. McConnell for \$143.00. And also on Dec. 28, 1951 Williams Packing & Navigation Company check No. 9559 issued to James N. McConnell for \$143.00.

Q. What was the last check number?

A. 9559.

By Mr. Nickman: Your Honor, we move to strike the last two items as being outside the ambit of this inquiry.

By the Court: Very well. I will sustain that motion.

Q. Now, with specific reference to the check of December [fol. 316] ber 31, 1953, to Mr. James N. McConnell for \$143.00, did the Williams Packing & Navigation Company actually receive any oyster leases?

A. There were no actual written leases delivered to me, no, sir.

Q. Did you draw this check, prepare this check?

A. I would have to see the cancelled check to determine whether I actually issued it myself or not.

Q. Do you know whether or not this check is still in the custody of your company?

A. I believe that it is, and I will make an effort to locate it if you would like to see it.

Q. We will request that you produce the check. Now, have you examined the books to determine whether or not any payments were made to the fishermen for painting the superstructures of the fishing trawlers?

A. No, sir, I did not, and it would take a considerable length of time to delve through all the records, and I don't know whether I could find anything like that.

Q. Do you have any independent recollection of your own whether any such payments were ever made?

[fol. 317] A. No, sir, I do not.

Q. Have you examined the books to determine whether or not any payments were made to the fishermen for their labor in reconstructing the property that was damaged in the 1947 hurricane?

A. No, sir, I haven't had an opportunity to dig that and again I don't know whether I could find anything that far back.

Q. Do you have any independent recollection as to whether or not that ever happened?

A. No, sir.

Q. Have you had an opportunity to examine the books to determine what the nature and extent of the current accounts receivable of the Williams Packing & Navigation Company are?

A. No, sir.

By Mr. Morse: We would object to that. I don't know what his answer is going to be but we object to it for the same reason he struck out those years '51 and '52, that that covers '58 and '59.

By the Court: Overrule the objection. It goes to the question of the ability of the corporation to pay the tax. [fol. 318] By Mr. Morse: He is talking about DeJean.

By Mr. Nickman: I said the Williams.

By Mr. Morse: I misunderstood you. I thought you said DeJean.

Q. Have you determined from your inspection of the books, Mr. Frieberger, the time when the two vessels, the Robert Favret and, I believe, the Senator Jim Eastland boat, when these two boats were bought or acquired?

A. No, sir, I didn't have an opportunity to dig into that.

Q. Did you have an opportunity to determine the date when they were gotten rid of?

A. No, sir, but if I may say this: I have a--As I told you, we borrowed money from the Peoples Bank and gave them a mortgage for those boats in order to pay DeJean for the boats, and it's my recollection that we did make a few payments on that note and finally the bank said that they didn't care to carry that any longer, and they requested that we take up our note. That's my recollection.

Q. Who at the bank made that request?
[fol. 319] A. I believe it was in writing, and I believe Mr. Glen Swetman did that.

By Mr. Morse: I will produce those documents for you. I have them in my office.

Q. Are you aware of the fact that at the time those boats were transferred the United States Government had federal tax liens recorded against those boats?

A. I don't know.

Q. Do you know whether anyone else would know?

A. No, sir.

By Mr. Nickman: Your Honor, there is a particular transaction or group of transactions which Mr. Krysa has been working on with the revenue agent which I have no particular familiarity with, and I ask Your Honor's indulgence to let Mr. Krysa interrogate the witness as to that aspect.

By the Court: Very well.

By Mr. Krysa:

Q. With reference to how DeJean is billed for the sale of the fish by Williams to DeJean, how is that handled?
[fol. 320] A. That is handled by an invoice at the end of the month.

Q. In other words, a separate invoice for each purchase is not made?

A. No, sir, not for each purchase.

Q. I believe you testified that the price of the fish sold to DeJean was the same as paid to the fishermen by Williams, is that correct?

A. The base price is the same.

Q. What else is included in that price?

A. The severance tax, for one thing, and a small profit which we call a handling charge.

Q. Is this handling charge added each month?

A. Yes.

Q. Who determines how much that handling charge will be?

By Mr. Morse: We submit that has been gone over, Your Honor. I recall it.

By the Court: Well, I'll overrule the objection and let him answer again. I think Mr. Nickman did go into it to some extent, but I will let Mr. Krysa proceed without duplicating, if he can possibly help it, anywhere.

By Mr. Krysa: Yes, Your Honor.

[fol. 321] A. Is your question who determines—

Q. Who determines the handling charge at the end of each month? Who determines how much it will be from month to month?

A. Well, the handling charge has been for the same amount for some time. I don't remember just who determined the amount in the beginning. I imagine I did in consultation with Mr. Williams as president.

Q. Is there any other increase in handling charge over the year other than the monthly rate charge?

A. Yes, at the end of the year we have the privilege of negotiating for an increase for the amount that has been—

Q. Who has the privilege of negotiating?

A. Williams has the privilege of negotiating with DeJean.

Q. Where do they get this privilege?

A. We have something in our minutes about a meeting that we had to discuss this business.

Q. As I recall you had something in the minutes discussing it for the fiscal year 1958, but is there anything else in the minutes to show there were discussion had for prior years, '53, '54, '55 and '56?

[fol. 322] A. I don't remember.

Q. You don't have the minutes with you?

A. I don't have them personally. They are in the hands of my attorney.

By Mr. Morse: There is nothing in the minutes to indicate that. I state that for the record.

By Mr. Krysa: All right.

By Mr. Morse: Except for the year '57 and '58.

Q. Isn't it a fact that this increase in the handling charge which is made at the end of the year is applied retroactively for each barrel of shrimp and each can of oysters that is sold to DeJean by Williams? Is that correct?

A. During that particular fiscal year.

Q. Right. What service is performed by Williams Packing & Navigation Company to entitle them to this so-called handling charge?

By Mr. Morse: To keep the record straight, they have been over that, and we want to——

By Mr. Krysa: We haven't been over this point.

By the Court: Overrule the objection.

[fol. 323] **A. Mr. Krysa, I said that that handling charge was actually a profit, didn't I?**

Q. Then no service, actual services, are performed?

A. Williams secures the shrimp and the oysters.

Q. Doesn't the fishermen secure the shrimp and oysters?

A. Well, it's through the efforts of Williams Packing and Navigation Company that they do.

Q. Do the fishermen share in the handling charge?

A. No, sir.

Q. Could you tell us why they don't? Isn't it a joint venture?

A. What they produce and share upon is a joint venture.

Q. Well, the services performed while they are producing and the handling charge is for services performed by the fishermen.

A. They don't share in it.

Q. Do the same people determine the adjustment at the end of the year that determine the actual handling charge that will be charged per month?

A. Substantially, I would say yes.

Q. Who are those people?

A. Mr. Williams and myself get together and then we [fol. 324] negotiate with DeJean to see if they are willing to give us an increase.

Q. Mr. Elmer Williams?

A. Yes.

Q. Could you tell us what elements or items are considered in the determination by yourself and Mr. Williams as to whether the handling charge will be increased and how much it will be increased at the end of each fiscal year?

A. I can't recall that off-hand right now.

Q. Isn't it a fact that at the end of the fiscal year you make a determination as to what the boat expenses are and see what your income from boat shares are, and if the ex-

penses exceed the boat shares income, an adjustment is made upward? Isn't that correct?

A. I lost track of you somewhere down the line there. We do review the records and see what the boat expenses was and what the boat income was and of course that is—the boat expenses, you might say, are considered the cost of doing business.

Q. And you do increase the handling charge where the [fol. 325] expenses exceed the income from boat shares?

A. If production is off and it cost us more to do business, I think we ought to have a little more profit to compensate.

Q. But this decision is made at the end of the year, isn't it?

A. Well, we don't know it any other time, what the final outcome is going to be at the end of the year.

Q. In other words, you look backwards and see what you should have been charging and then charge it retroactive?

A. I wouldn't state it in just that way.

Q. Have you ever increased the handling charge when the boat share income exceeded the boat expenses?

A. I don't recall.

Q. You don't recall?

A. I don't recall one way or the other what the status was when we made the adjustments.

Q. Who would you say has the final say in determining how much the handling charges will be increased at the end of the fiscal year?

[fol. 326] A. I wouldn't know whose the final say-so is, but whatever it is, whatever it is that DeJean is willing to pay over and above that nominal charge that we set up each month is what we would have to take, isn't it?

Q. When you refer to DeJean, who do you mean?

A. We are selling the shrimp to DeJean, aren't we?

Q. Who do you sit down with and determine how much /the handling charge will be increased by?

A. Well, I talk to Mr. Elmer Williams in consultation with our auditor. Now, it's possible that Mr. Williams will talk to his other partners. I have no knowledge of that.

Q. Now, you would say that Mr. Elmer Williams when you were having these discussions is sitting as president of the corporation and also as manager and partner of DeJean at one and the same time?

A. Mr. Williams does act in a dual capacity. He has to.

Q. You say your auditor is also——

A. —On occasions, on occasions he is present. I don't recall any specific occasions, but I imagine he is. He is there to advise us and to keep our records straight.

[fol. 327] Q. Would you say that when Mr. Williams is sitting in his dual capacity considering the increase, that it is an arm's length transaction?

By Mr. Morse: We submit that is a question of law.

By the Court: Sustain the objection.

Q. Could you tell us when Mr. Price started his investigation which resulted in the assessment of the tax that is in issue in this case?

A. Could I tell you when?

Q. When.

A. Not precisely. I believe it was in the year 1956.

Q. Would it be March '56?

A. I don't know. I really don't know.

Q. That is the issue in this case, and you don't know?

A. Well, I don't know when Mr. Price and Mr. Richards walked into our office to check us. I didn't mark it on the calendar or anything like that.

Q. Would you say I was wrong if I said it started in March of '56?

A. I wouldn't know whether you are right or wrong, Mr. Krysa.

[fol. 328] Q. Isn't it a fact that a protest was filed on behalf of Williams Packing and Navigation Company in May of '56 after they were notified as to what the assessment would be, the proposed assessment?

A. I didn't prepare the protest myself, Mr. Krysa.

Q. Aren't you a director in Williams Packing & Navigation Company?

A. That's right, but I don't remember all those dates!

Q. And you are the secretary?

A. That's right, but I can't remember all those dates.

Q. This is what this lawsuit is about.

By Mr. Morse: What?

Q. You wouldn't deny then that as of the end of the fiscal year 1956 Williams Packing & Navigation Company had

knowledge of what this assessment would be—that is, the amount—would you?

A. I knew what the amount was, but I don't know about that date.

Q. Do you know how much the surplus was that Williams Packing & Navigation Company held as of June 30, 1955? [fol. 329] A. No, sir.

Q. Would you look at this corporation income tax return filed by Williams Packing & Navigation Company for the fiscal year ending June 30, 1955, and look at the balance sheet and tell the court what the surplus was?

(Hands to witness)

A. This thing on line 14 says "earned surplus and undivided profits at end of preceding taxable year." Is that the one you mean?

Q. It says "end of taxable year."

A. I'm reading right here.

(Counsel indicates)

A. Oh, this is the line you want. All right. The earned surplus and undivided profits at the end of the taxable year were \$53,988.67.

Q. And how much is this assessment for?

A. Something close to \$50,000 with interest, I believe.

Q. As of this date? I mean as of—

A. —I don't know what date, but I remember the figure was around fifty thousand.

Q. Isn't it forty-one thousand, plus interest, from the date of the assessment?

[fol. 330] A. That's about right.

Q. Isn't it a fact that this surplus as of the end of the fiscal year 1955 was still intact at the end of the fiscal year 1956 when Williams had knowledge of how much the assessment would be?

A. What year is that that you have there?

Q. This is fiscal year ending 1955.

A. We'll have to look at the record and see what it was in '56. Isn't that the question you asked me?

Q. My question is, wasn't this surplus intact up until the end of the fiscal year 1956 when you had knowledge of how much this assessment was going to be?

A. I don't know. We'll have to look at the return and see.

Q. Isn't it a fact that you make all your adjusting entries at the end of the year?

A. I'm sorry, but I can't follow what you are trying to do here.

Q. Do you make your adjusting entries at the end of the year?

A. The adjustment entries are made at the end of the fiscal year.

[fol. 331] Q. Then this surplus, whatever, remained intact, is that right?

A. Yes, whatever that was, yes, it would be intact.

Q. Now—

By Mr. Morse: Are you talking about '55 or '56?

By the Witness: Well, whatever that figure is and for whatever year he has down there, at the end of that fiscal year that surplus was intact.

Q. You testified you were familiar with the current lease under which Williams is operating boats of DeJean, is that correct?

A. I have some knowledge of it.

Q. Doesn't that lease provide DeJean will pay for all the ice used by the boats in the operation and Williams will reimburse DeJean for one-half the ice?

By the Court: Now, let me see. Is that the lease between the fishermen and the boats?

By Mr. Krysa: No, sir, the lease between DeJean and Williams. I'd like to show it to the witness.

Q. Will you read that sentence commencing with "Lessor".

(Hands witness)

[fol. 332] A. Lessor agrees to purchase and pay for all ice used on boat operations and lessee agrees to reimburse lessor for one-half the cost thereof."

Q. And who is the lessor and the lessee in this transaction?

A. I get kind of confused on that legal terminology. I don't know which is lessor and lessee. Let's see.

By Mr. Morse: Look at the first part of it.

Q. Well, the lessor is the party that leases the boats to another individual.

A. And the lessee is the one who leases.

Q. That's right.

A. Well, the lessor in this case would be DeJean and the lessee would be Williams.

Q. That's right. So Williams according to the lease must reimburse DeJean for one-half the cost of the ice.

A. That's what this says.

Q. Has Williams always reimbursed DeJean for one-half the cost of the ice?

[fol. 333] A. Your back was turned.

Q. Have the terms of this lease always been carried out as to ice?

A. There may have been some deviations from it.

Q. Why are there deviations when the leases specify exactly the procedure to be followed?

A. Williams can ask DeJean to waive the ice charge in view of the fact the operations for the year show a loss.

Q. Have they ever asked them to waive it?

A. On these years where the ice charge was not set up, yes.

Q. Will this appear in the minutes of the corporation?

A. I don't know.

Q. Aren't you secretary of the corporation?

A. I am, but I can't remember everything in the minute book.

Q. And also director?

A. I can't remember everything in the minute book.

Q. Isn't it a fact that at the end of the fiscal year 1958 Williams didn't reimburse DeJean for one cent of the ice used that year?

[fol. 334] By Mr. Morse: We object to that. They confined—

By Mr. Krysa: Your Honor—

By Mr. Morse: —Wait a minute. We object to that because they confined themselves in the issues in this case to the years '53, '54 and '55. If we go into all these years we are going to be here two months trying, not the issues in the case, but we are going to be digging into books

and little old questions that they are asking about, something that has no relevance or competency in the case whatsoever.

By Mr. Krysa: Your Honor, this goes to the shifting of income which is—which has a direct effect on the ability to pay.

By the Court: Yes, I overrule the objection.

Q. Would you answer the question, please?

A. Your question, I believe, was whether or not—

Q. Isn't it a fact that for the fiscal year ending June 30, 1958, Williams didn't reimburse DeJean one cent for the ice used in the operations during that year?

A. I think that is correct.

Q. What does the lease state?

[fol. 335] By Mr. Morse: We object to that. He has already been over it.

By the Court: Sustain the objection.

Q. Explain to us why Williams didn't pay anything on the ice cost for that year?

A. No, sir, not right now, I can't recall right now.

Q. Who would know that?

A. If you will just let me compose myself and think a little, maybe I can give you an answer.

By Mr. Morse: I think he's inclined to be a little nervous.

By the Court: He may take all the time *he needs* to answer the question.

By Mr. Morse: You want to take a little time?

By the Witness: I'd like to, if you don't mind, like to have a little drink of water.

By the Court: Yes, sir, very well. Go get a drink of water. Let's don't take a recess.

(Witness is excused for a dring of water and then resumes the stand.)

[fol. 336] (The last question was read by the reporter.)

A. As to why the Williams Packing & Navigation Company did not assume or pay part of the ice charge, I think the record will bear out that during the *operarions* of that year the Williams Packing & Navigation Company sus-
f

tained quite a large loss in their operations, and we so advised the interested parties of DeJean and asked if they wouldn't waive that charge for that period.

Q. When did you so advise the parties interested in the DeJean Packing Company?

A. That would be at the close of the fiscal year, some time after June 30 when we were able to determine just what the outcome of the operations for the year were.

Q. Isn't it your normal procedure where the expenses are excessive to increase the handling charge to take care of this loss?

A. That handling charge is a nominal charge, and it's intended to reflect the very minimum, the very minimum that Williams expects to receive in the way of a profit for the handling of those shrimp and oysters.

[fol. 337] Q. Then, in other words, you would say that that handling charge, which is the minimum, should be added at the end of each fiscal year.

A. The very minimum?

Q. The very minimum.

A. It could be.

Q. Which was added in 1958. You did increase the handling charge in 1958, didn't you?

A. The handling charge is still \$1.50 a barrel.

Q. I mean the adjustment.

A. The adjustment. I thought you were speaking about the monthly—

Q. I'm speaking about the increase.

A. Adjusting entries at the end of the year.

Q. —at the end of the year, the shifting of income.

A. We had no way of telling on a monthly basis what the final outcome of our endeavor was going to be at the end of the year.

Q. My question was that the increase in the handling charge at the end of the fiscal year 1958 is the very minimum and Williams expects to get it each year if they incur these losses. Isn't that correct?

[fol. 338] A. If you are referring to that increase by adjustment—

Q. I'm referring to the increase at the end of the fiscal year 1958.

A. It might be possible to obtain a larger amount.

Q. But that is at least the minimum.

A. The \$1.50.

Q. I'm talking about the increase at the end of the year.

A. No, no. That isn't necessarily a minimum, no, sir. That isn't necessarily a minimum. When I said minimum I was referring to the monthly handling charge.

Q. I'm referring to the adjustment, the shifting of income.

A. No.

Q. What would be a minimum increase?

A. I don't know what a minimum increase would be right now.

Q. In other words, you have to look backwards?

A. We want to see how—

Q. An arm's length transaction to see how much to increase the handling charge.

A. I wouldn't call it that.

Q. You wouldn't call it an arm's length transaction?

[fol. 339] A. No, I don't know what you mean by arm's length transaction. We want to wait and see how we make out at the end of the year and if we have a tremendous loss due to the fact production is off and boat expenses high, we want to try to show some kind of profit on the books, and we negotiate for the increase.

Q. Was Mr. Lee Meyers involved in this discussion whereby Williams decided that they would not reimburse DeJean for any of the ice cost at the end of the fiscal year 1958?

A. I don't remember, but he may have advised us one way or the other.

Q. Would you say that you could look at the books and records of Williams Packing and Navigation Company, Inc., at any given time and determine the net worth of that corporation at that given time?

A. No, sir, I could not.

Q. At the hearing held on the Government's Motion to Produce on Jan. 17, on direct examination of Mr. Stanford Morse, Sr., he asked you, "Are the transactions of Williams [fol. 340] Packing & Navigation Co. duly recorded in their books?" Your answer was "Yes, sir." "Are the transactions of DeJean Company reflected in its books?" Your answer was "That is true." "Can you take each set of books

and find out the condition of DeJean and Williams?" Your answer, "Yes, sir, it is possible." "I meant from a net worth standpoint." Your answer was "Yes, sir." Are you now changing your testimony?

A. Yes, sir, it is possible to do it, but I couldn't go up to the office right now and do it.

By Mr. Kryso: No further questions.

Redirect examination.

By Mr. Morse:

Q. Can you get the 1956 corporate return of Williams Packing & Navigation Company which would show whatever surplus it had at the end of the fiscal year 1956?

A. Mr. Morse, I think you have those returns.

Q. No, sir, I have them up through '55.

[fol. 341] A. I'll have to go look in the office nad see if I can find them.

By Mr. Morse: Do you have a '56 return?

By Mr. Krysa: They are being photostated.

By Mr. Morse: We would want to ask him about that.

By the Court: Very well. You can recall him for that. Anything further at this time? Any other questions other than that while he looks for that?

By Mr. Morse: That's the only thing. Just as soon as he gets it.

Q. I have one question I could ask to clarify a matter that has been brought out. Mr. Frieberger, they asked you about making up a net worth statement. Ordinarily when is that made up?

A. At the end of the fiscal year.

Q. Could you if you were requested to so do make up a net worth statement for any given period of time?

A. Yes, sir, it could be done.

Q. If they would give you the time to do it?

A. It could be done.

[fol. 342] Recross-examination.

By Mr. Krysa:

Q. Did I understand you to just state you could look at the Williams Packing & Navigation Company books alone at a given time and set up a net worth statement, determine its net worth?

A. You understand that I'm not a C. P. A., but I think that I have enough knowledge in following the procedure set up that I think that I could get a fairly accurate statement.

Q. What do you mean by "fairly accurate?" The books and records are in order?

A. Yes, yes, but I'm talking about as to the make-up and set-up of the thing.

Q. I don't follow you. What do you mean?

A. When you talk about net worth you have to make a balance a balance sheet first, don't you?

Q. That's right.

A. I have enough knowledge of accounting and book-keeping to make a balance sheet.

Q. By referring to Williams books?

A. Yes, sir.

[fol. 343] Q. Could I ask you to make up a net worth statement from Williams books alone as of May 31, 1956, and bring it?

A. May 31?

Q. As of May 31, 1956.

By Mr. Morse: We can give it to you as of June 30.

By Mr. Krysa: I'm asking for May 31, 1956.

Q. —And bring it to court with you this afternoon or tomorrow?

A. Oh, no, I couldn't do that in that time.

Q. Why couldn't you?

A. You have to make certain year end adjustment, not necessarily—You have to make the same adjustments for the comparable period that you would make at the end of the year.

Q. Do I understand you to say you cannot make a balance sheet showing the net worth of Williams as of May 31, 1956, by confining yourself to Williams' books?

A. I'm confining myself to Williams books. That could not be done just by merely the actual figures you would [fol. 344] get off the books. You can never make a financial statement or net worth statement that would be accurate or anywhere near accurate by just the figures you see on your books. There are other things that have to be taken into consideration.

Q. Are you speaking now for every business or just Williams?

A. In my opinion, anyway, for any business.

Q. Didn't you just testify in answer to the question by Mr. Morse that you could determine this net worth statement?

A. It can be determined, yes.

Q. But now you say you can't to it?

By Mr. Morse: We object to him arguing with the witness.

By the Court: Yes, sustain the objection.

By Mr. Krysa: That is all.

By the Court: Very well. Mr. Morse, anything further?

By Mr. Morse: This is a copy of a return in the handwriting of Mr. Meyers, and if You want me to, I'll have him identify it,—from which the original was made.

By the Court: You say you can prove that by Mr. Meyers?

By Mr. Morse: Yes, sir.

Re-redirect Examination

By Mr. Morse:

Q. Mr. Frieberger, I'm handing you U. S. corporate tax return for the year ending June 30, 1956. It is in pencil, the figures are in pencil, and Mr. Lee Meyers presented it, and we have submitted it to counsel for the defendant. Now, look on there and see what the surplus was for the year ending—the fiscal year—ending June 30, 1955, if you can find that figure.

A. That is the beginning of the fiscal year, and that would be \$53,988.67.

Q. Is that the figure you testified to about when Mr. Krysa—?

A. That is the same figure.

Q. Now, according to the figures based on the copy that [fol. 346] you have there, what was the surplus, if any, on June 30, 1956?

A. \$16,373.09.

By Mr. Morse: That is all.

(Witness excused)

LEE MEYERS, called as a witness by the Plaintiff and having been duly sworn, testified as follows:

Direct examination.

By Mr. Morse:

Q. Your name is Lee Meyers?

A. Yes, sir.

Q. What is your business or profession?

A. Public accountant.

Q. Where is your residence?

A. Lake Providence, La.

Q. What business do you engage in for Williams Packing & Navigation Company?

A. I make an examination of the books.

Q. Is that an audit?

[fol. 347] **A.** Yes.

Q. When is that usually made?

A. Shortly after June 30 each year, at the close of the fiscal year.

Q. That is when the fiscal year ends?

A. Yes, sir.

Q. At my request did you make up a balance sheet as of August 31, 1957, of Williams Packing & Navigation Company?

A. Yes, sir.

Q. Was that made from the books of Williams Packing & Navigation Company?

A. That was made from the books and certain adjustments; worksheet adjustments had to be made.

By Mr. Morse: I furnished you all with a copy of this.
(to counsel opposite)

Q. What is that I hand you?

A. That is the balance sheet of Williams Packing & Navigation Company, Inc., as of Aug. 31, 1957.

Q. What was the condition of Williams Packing & Navigation Co. as of Aug. 31, 1957?

A. Showed an earned surplus of \$516.00.

[fol. 348] Q. What was it as of June 30, 1958? What was its condition?

A. Surplus deficit of \$9,229.82.

By Mr. Morse: We desire to offer that in evidence, please, as an exhibit to his testimony.

(Same received and marked as Plaintiff's Exhibit No. 27.)

PLAINTIFF'S EXHIBIT No. 27

[fol. 348a]

Williams Packing and Navigation Co., Inc.

Balance Sheet

August 31, 1957

Assets

Due from DeJean Packing Co.	\$ 20,269.02
Prepaid Taxes	342.50
Total Assets	<u>\$ 20,611.52</u>

Liabilities and Capital

Bank overdraft	\$ 1,170.72
Bonuses Due Boatmen	2,327.50
Grocery Accounts Payable	269.21
Oil Accounts Payable	7,632.55
Ice Accounts Payable	301.30
Unpaid Shrimp Tickets	7,071.72

Accrued Expenses and Taxes:

Corporation Franchise Taxes	\$ 10.00	
Interest	110.02	120.02
Severance Taxes		202.50
Total Liabilities		<u>\$ 19,095.52</u>

Capital and Surplus:

Capital Stock, Issued and Outstanding		1,000.00
Surplus (Deficit) Balance at June 30, 1957	\$ (328.56)	
Tentative net Profit for July and August 1957	844.56	516.00
Total Liabilities and Capital		<u>\$ 20,611.52</u>

Surplus (Deficit) at June 30, 1957	\$ (328.56)
Net Loss for Fiscal year Ended June 30, 1958	(8,901.26)
Surplus (Deficit) at June 30, 1958	<u>\$ (9,229.82)</u>

Q. You're not a C. P. A.?

A. No, sir.

Q. Before you became an accountant, did you hold any position with the Internal Revenue Service?

A. Yes, sir.

Q. What was your position?

A. Well, at the time I resigned I was in charge of the office at Gulfport. I believe my title was Zone Deputy Collector in Charge.

Q. Who were you working under at that time?

A. Mr. Eugene Fly was the Collector of Internal Revenue in Jackson.

Q. How long were you in the Internal Revenue Service? [fol. 349] A. From 1941 up to December, 1946, except for two years military leave.

Q. Two years military service. In that time did you become familiar with the rules and regulations and administrative procedure of the Internal Revenue Service?

A. Well, I took the courses offered by the service on accounting and income tax laws.

Q. Before you went with the Internal Revenue Service what education did you have? What form of education did you pursue to being an accountant?

A. Well, I attended Chillicothe Business College.

Q. Is that the one in Ohio?

A. No, Missouri.

Q. Did you complete your course?

A. Yes, sir.

Q. You graduated in it?

A. I got a diploma.

By Mr. Morse: I believe that is all:

Cross-examination.

By Mr. Krysa:

Q. I believe you testified, Mr. Meyers, that you were [fol. 350] familiar with all the procedures involving income tax?

A. Not all the procedures, I wouldn't say that.

Q. Are you familiar with social security taxes?

A. To an extent, yes, sir.

Q. Unemployment taxes?

A. Yes, sir.

Q. Were you present in the courtroom when Mr. Nickman referred to Section 6031(A) of the '54 Code?

A. When?

Q. This morning, relative to the filing of partnership returns for every partnership, as defined by that section which included a joint venture?

A. Yes, sir, I was present.

Q. Are you familiar with that section?

A. I probably read it. That's the '54 Code?

Q. '54 Code, yes, sir.

A. I probably read that section.

Q. Didn't you know of your own knowledge that partnership returns must be filed in accordance with this section by all partnerships as defined by this section, as I say, which includes a joint venture?

[fol. 351] A. If it comes within that provision, it would require it.

Q. Doesn't it say "joint venture," as read to you by Mr. Nickman?

A. I believe it says joint venture, yes, sir.

Q. Don't you file a partnership information return for DeJean Packing Company?

A. Yes, sir.

Q. Have you ever advised the Williams Packing & Navigation Co. that they should file partnership returns for information purposes for the joint venture with their fishermen?

A. Have I ever advised them?

Q. Have you ever advised them?

A. No.

Q. Have they ever requested you to file such returns for the joint venture with their fishermen?

A. No, I wouldn't know that they would be required in that case.

Q. Mr. Frieberger testified that this joint venture was common knowledge.

A. Well, now, I don't know whether Mr. Frieberger would be an authority on that or not. I know I'm not.

[fol. 352] Q. I believe you testified as to what the surplus, if any, was for Williams as of August 31, 1957. I can't seem to find it—Can you help me?

A. August 31, '57?

Q. Yes.

A. \$516.00.

Q. \$516.00 was a surplus?

A. Yes, sir.

Q. This is a balance sheet, is that correct?

Q. Yes.

Q. And it's made as of August 31, 1957, which is in the end of a fiscal year for this company, is that correct?

A. That is correct.

Q. Didn't Mr. Frieberger testify that it was impossible to make a balance sheet for Williams Packing & Navigation Co. just by referring to its books alone other than at the end of a fiscal year?

A. I think what Mr. Frieberger meant there, there would have to be certain adjustments made in order to prepare a correct balance sheet.

Q. But Mr.——

[fol. 353] A. —Other than taking figures as they stand on the books. You got certain accruals and other items of adjustment.

Q. Were you present in the courtroom when Mr. Frieberger testified that these adjustments are made at the end of the year?

A. At the close of the fiscal year they are put on the books.

Q. Isn't that what he said? In other words then, isn't this a fair fact: that as of Aug. 31, 1957 Mr. Frieberger and Mr. Williams got together and made certain adjustments which resulted in this balance sheet, contrary to the usual procedure, which is to make adjustments at the end of the fiscal year?

A. No.

By Mr. Morse: I think you can explain why that was made and you might straighten him out on it.

A. I prepared that statement from the books, certain adjustments there, and Mr. Price conferred with me on it and I think probably he agrees—I understood it that way—

that that would be a substantially correct balance sheet as [fol. 354] of that date as far as we could determine.

Q. Could you tell me when this document was composed?

A. A few days ago.

Q. Just a few days ago?

A. Yes, sir.

Q. Were you present in the courtroom when Mr. Frieberger testified he couldn't prepare a balance sheet by referring to Williams books alone as of May 31, 1956?

By Mr. Morse: This was net worth, I believe he stated.

By Mr. Krysa: A balance sheet will reflect net worth, Mr. Morse.

A. State that question again.

By the Court: Gentlemen, I don't like to raise objections myself, but I don't remember Frieberger having testified to that. Frieberger, as I recall, testified that it was possible he couldn't do it right at the moment. But it is for the Court to determine the weight of Mr. Frieberger's testimony and the recollection of it, and in order to save [fol. 355] time I think you should ask this witness the questions, rather than as to what Mr. Frieberger testified to.

Q. Could you make the balance sheet for Williams Packing & Navigation Co. by referring to it's books only, an accurate balance sheet, as of May 31, 1956, confining yourself solely to Williams' books?

A. I think probably it could be done. I prepared this one, the August 31st.

Q. I can't hear your answer.

A. I think it could be done.

Q. You could prepare such a balance sheet?

A. You say without referring to what?

Q. Without referring to the books of DeJean.

A. No, there are certain—

Q. Then your answer is "no"?

By Mr. Morse: Let him answer the question.

A. You would have to refer to DeJean, some of the transactions there on the boat expenses and so forth.

By Mr. Krysa: No further questions.

By Mr. Morse: That is all.

(Witness excused)

[fol. 356] JACK WILLIAMS, called as a witness and having been duly sworn, testified as follows:

Direct examination.

By Mr. Morse:

Q. What is your name?

A. Jack Williams.

Q. What occupation are you engaged in?

A. Fisherman.

Q. What boat are you working on?

A. Working on the Elmer Williams II.

Q. Who furnished you that boat?

A. Williams Packing Company, Navigation and Packing Company.

Q. Explain to the Court the circumstances under which that boat—Strike that. How long have you been engaged in the fishing industry?

A. I been working for that company 35 years.

Q. Working for them 35 years?

A. Yes, sir.

Q. When you first started working there, were you a crewman or were you a captain?

A. No, I was a captain.

Q. Have you been a captain continuously?

[fol. 357] A. I been a captain since I was 21 years old.

Q. And how old are you now?

A. Sixty-two.

Q. Now, when the boat was furnished you, when the Elmer Williams II was furnished you, how was it turned over to you?

A. Well, I went and saw Mr. Williams and got the boat, and I taken captain of it, and previous to that I owned a boat. I sold it to them.

Q. You owned the Elmer Williams II?

A. Yes, sir, that's right.

Q. You sold it to them?

A. That's right.

Q. When you owned the boat and when you afterwards were captain of the boat, after Mr. Williams turned it over to you, were you working on any different basis either one time or the other?

A. No, I been working that way ever since I been running a boat, just the way I'm working now.

Q. When they turn a boat over to you, Captain, with reference to the selection of the crew, who selects that crew?

A. I do.

[fol. 358] Q. If there is any discharge of that crew, who discharges it?

A. I do. That's up to the captain.

Q. Does Williams Packing & Navigation Company have anything to do with the hiring of any crew or the firing of any crew?

A. None to my knowledge.

Q. Have they ever done that to you?

A. Never.

Q. With any of your crew members?

A. No.

Q. Who determines when to go out fishing?

A. That's left entirely up to the captain.

Q. I say, who determines that?

A. The captain uses his own judgment on that.

Q. Who determines where to go and fish?

A. That's up to the captain.

Q. Who determines whether to fish in daytime or nighttime?

A. That's still up to the captain because you got to fish--if the shrimp are running at night you got to catch them at night, and if they are running in the daytime you got to catch them in the daytime.

[fol. 359] Q. Who determines when to come in after the catch is made?

A. Up to the captain and up to the cargo of what he's got.

Q. When a boat is turned over to you, how are the boats rigged?

A. Well, the captain sees that he has a rig on it. That's up to him.

Q. Explain to the Court what you mean by a rig?

A. When you go get the boat, then you go to get the rig. You get the trawl from Eldon Murrell, and the lines you order them and get them from Bartlo Hunt or whoever you want to get them from. Then you got the boards and equipment and then you oil your boat up and get your groceries and then you ice up, and then you're ready to go.

Q. Now, who determines what type of trawl, the size and the length, and what type of rig?

A. That's still up to the captain.

Q. Does Mr. Williams, or has he ever had anything to say about that?

A. No, he never has to me.

Q. Now, with reference to fuel, groceries and ice, who orders that?

[fol. 360] **A.** The captain most of the time orders the ice, and the crew will get the oil and the groceries. Most of the time they got one man does the cooking on the boat, and he goes along, orders the groceries, but it's all done under the captain's supervision.

Q. Can the captain and crewmen buy any type of groceries, meat, fancy groceries, beer, whisky, cigarettes or cigars that they want to and put on that boat?

A. They can buy what they want. I never have seen any objection to it.

Q. When that is bought, when the groceries are bought, how are the groceries and the fuel and ice paid for?

A. Well, at first you get your amount of stuff, whatever you got, unloaded. Then that's taken into the office and the expenses taken out and then it's equally divided, in shares. The captain and crew all divide alike. There's no difference in the share.

Q. When a rig is paid for by the operation of the captain and crewmen, does the rig then get a share of the earnings of the boat?

[fol. 361] **A.** Not after the rig is paid for. After the rig is paid for, there's no more share drawn for it until you buy some. When you buy some and start putting it back on the rig, then they start taking out a share until it's paid for. If it's overpaid for, you can draw that out and share it equally and—or you can leave it stand until you lose something or buy something else.

Q. Suppose you wanted a radio put on the boat? Who pays for that? How is that radio paid for?

A. Well, the radio is paid for out of the expense. That comes out of the share too. That goes on the rig.

Q. After it's paid for, would the captain and the crewmen have equity in that radio as well as they would the rig?

A. That's right.

Q. Suppose you put a depth finder on?

A. That 's the same thing. That all goes under rig.

Q. That is a part of the rig?

A. That's right.

Q. Describe to the Court, if I haven't *ocvered* them all, what items would go into what you call rigging up a [fol. 362] boat.

A. Well, first you would have to start with the blocks that you heist your stuff aboard, what you heist your trawl up. Then you have to get your tackles, and your shovels and your trawls and boards, and petroleum cans, and you got a small trawl and small board and a cable for that. That goes into the rig. If you want a depth recorder, that goes in. If you want a radio, that goes in. You really don't have to have a radio, because I run a boat a long time without it. All that goes into the rig.

Q. Now, Captain, when the Gulf Coast Shrimpers and Oystermen Association was in action here, were you a member of it?

A. I was.

Q. Were you an officer in it?

A. I was.

Q. With the exception of not fixing the prices, and from your observation of the operations of Williams Packing & Navigation Company and the boat captains that you come [fol. 363] in contact with, has there been any change in the method of operation of the boats by the captain and crew members since that suit, from what there was before that suit?

A. Not at all.

Q. What change has been made?

A. There hasn't been any changes at all as I can see.

Q. Does the union fix prices now?

A. No.

Q. Is that the only change?

A. That's all.

Q. Have you in the past on occasions when you were operating the boat that has been furnished you by the Williams Packing & Navigation Company sold the catch of either oysters or shrimp to third parties?

A. I sold shrimp, no oysters. I sold shrimp at Empire, La.

Q. Was that on one of the company-owned boats?

A. That's right.

Q. Company-leased boats?

A. That's right.

Q. When you came in, what did you do with the share that you brought in?

[fol. 364] I brought the money to the office.

Q. To Lou Frieberger?

A. That's right.

Q. And he divided it up, did he?

A. That's right.

Q. Are you any relation whatsoever to Elmer Williams?

A. Not at all.

Q. Horace Williams?

A. That's my son.

Q. Does he own his own boat?

A. Yes.

Q. George Williams, the president of the Maritime Union?

A. That's my son too.

Q. That is your son too. You are related in any way to Elmer Williams?

A. Not at all.

By Mr. Morse: That is all.

Cross-examination.

By Mr. Nickman:

Q. Mr. Williams, during the 35 years that you were working for the Williams Packing & Navigation Company—[fol. 365] I believe you said you were with that company for 35 years?

A. I been there, yes, sir, 35 years.

Q. 35 years. Now, Captain, during that period of time how many boats, company-owned boats, have you been a captain on?

A. I been captain of one.

Q. Of one?

A. Yes, sir.

Q. You been on the same boat for 35 years?

A. No, sir, I haven't. I been on this one particular boat now about, I'd say, about 12 years.

Q. What is the name of the boat you have been on for 12 years?

A. Elmer Williams II.

Q. Can you give us the dates that you have been the captain of that vessel?

A. I been captain of that vessel for 12 years, yes, sir.

Q. For the past 12 years?

A. Yes, sir.

Q. Before that, immediately prior to that, what vessel were you the captain of?

[fol. 366] A. The Elmer Williams, the first one.

Q. How long were you captain of that one?

A. I couldn't exactly tell you.

Q. Approximately.

A. Well, I'd say about, must have been about 12 or 14 years.

Q. Were you captain on any other vessels?

A. I was captain of the Regal.

Q. What was the name?

A. Regal, REGAL.

Q. Was that a company-owned vessel?

A. No, sir.

Q. Who owned it?

A. I did.

Q. You owned it?

A. That's right.

Q. So you have been captain of only company-owned boats?—That is, only two company-owned boats, is that right?

A. No, sir, one.

Q. Just one?

A. Yes, sir.

[fol. 367] Q. You mean the other was also an independent boat?

A. That's right.

Q. Now, during the time you have been on the boats of the Williams Packing & Navigation Company—and I would

like you to confine your answer just to the company-owned boats. We're not discussing independent boats.

A. Yes, sir.

Q. During the time you were captain on the company-owned boat, did you receive any bonuses?

A. I did on shrimp.

Q. Did you receive any bonuses on oysters?

A. I didn't dredge but two years. I drudged last year and year before last. I received bonus on oysters too.

Q. On the company-owned boat, did you do any painting of the superstructure of the boat?

A. Sometimes I did, paint the pilot-house.

Q. Did you get any money for that?

A. No, sir, I didn't expect any.

Q. Isn't it the customary practice to paint the superstructure once a year?

[fol. 368] A. It's been a custom of us in Biloxi ever since I been running a boat that we did that, on account of one thing. There's times that we'd bring in fish we didn't sell with the shrimp and the boat and the factory didn't get anything out of that, and sometimes we'd make as high as \$50 or \$60 out of that. So we figured we wasn't doing anything for nothing, that we was getting paid.

Q. You are only speaking for yourself in this connection, isn't that correct?

A. That's right.

Q. Did you consider yourself a good producer?

A. I think so, yes, sir.

Q. Isn't it a fact that the Williams Packing & Navigation Company at regular intervals has production records of its captains and boats? That is, how they are doing on shrimp, which boats are producing the best, which captains.

A. Well, they should have.

Q. Have you seen some of these?

A. No, sir, I haven't asked for them.

Q. Have you ever seen any?

[fol. 369] A. Well, no, sir.

Q. How can you determine whether you are a good producer as compared with other captains on the vessels?

A. At times it has and at times it hasn't. That runs upon the season.

Q. Do you have conversations from time to time with captains of the other vessels as to how they are doing?

A. We do.

Q. Mr. Morse just asked you what the situation was about, shall we call it for the purpose of this trial, price of the fish. He asked you how the prices were established after the anti-trust suit. Can you tell us how these prices are determined now, or after the anti-trust suit how they were determined?

A. I don't get the question.

Q. Let me put it to you this way: Do you receive from time to time price lists from the company as to what the company will pay for seafood?

A. Yes, we do that.

[fol. 370] Q. When do you receive those so-called price lists?

A. What?

Q. When do you receive them?

A. Well, we receive them according to the market. If the price is lowered or raised at other places, we get the same thing as they get.

Q. If you are out on a trip and you return to the packing house, may you not sometime receive a change in the announced price of the company that they will pay?

A. Not on that specified trip, no, sir. I get what I went out for.

Q. Have there been times you came back and they gave you a list that the new price on the next trip would be a different price?

A. They have that; also it would be a higher price.

Q. You stated that you had sold to an outside buyer in Empire, La. When was that?

A. I couldn't recall the exact year. I know it's been at least 4 or 5 years.

Q. At least 4 or 5 years.

A. Yes, sir.

[fol. 371] Q. Who else was on the vessel besides you?

A. My son was on there.

Q. Which son?

A. James.

Q. Who else?

A. That's all. Just the two of us.

Q. Was this a shrimp trip or an oyster trip?

A. Shrimp trip.

Q. How many barrels of shrimp did you sell?

A. I can't recall just exactly what I sold, but I think it was somewhere around three hundred dollars worth.

Q. About three hundred dollars?

A. Yes, sir.

A. Were there any other boats from the Williams Packing & Navigation Company that also sold at that time?

A. There was two other boats there with me that sold at that time. The Miss Ocean Springs, she also worked for DeJean Packing Company—for Williams Navigation and Packing Company,—and the Leon Hall.

Q. Now, the Miss Ocean Springs, was that a company-owned boat or an independent?

[fol. 372] A. No, that's an independent boat.

Q. That was an independent boat?

A. That's right.

Q. What was the other?

A. She belonged to my oldest son. She was an independent boat.

Q. She was an independent boat?

A. That's right.

Q. Now, to whom did you—Strike that. Who took the catch which you disposed of?

A. Who did what?

Q. Who took this catch you disposed of at Empire, La.?

A. We sold them to Martin.

Q. Sold them to a market?

A. To Martin. Martin. He's got a business down there. He buys shrimp right on Empire Canal.

Q. What were the circumstances underlying that transaction?

A. Well, there wasn't any circumstances at all. The general rule of it, if you want the facts, that's what I'm trying to tell you, is that when we go out like that and go across the river and get to shrimp and figure it's going to take too long to make the trip, we go in there and buy more fuel [fol. 373] and ice and finish our trip.

Q. You didn't have enough ice aboard to get back to Biloxi, is that right?

A. No, I bought some ice.

Q. Pardon me?

A. I bought some ice.

Q. Where?

A. Down at Empire.

Q. Did you have enough ice aboard at that time to keep the shrimp available and in good condition to get back to Biloxi?

A. I would have had, but I wouldn't have made anything when I come back.

Q. Isn't it a recognized fact that where you are away from port at a distance and that you can't get back either because of fuel trouble, boat trouble, or running short of ice, there is a tacit understanding that the fish can be sold?

A. No, sir. The way I also run it, and it seems to me the captains run the boat, they went out and they use their own judgment about that.

[fol. 374] Q. Do you know whether or not any similar catches have ever been disposed of to Martins?

A. Yes, sir, quite a few, but I couldn't specify what boats it was.

Q. Do you know Mr. Martin?

A. Not specially. I sold them to the man he sends down there to buy.

Q. Are there any other buyers of shrimp at Empire, La.?

A. Yes, sir.

Q. Why did you just happen to select Martins?

A. Cause it's right alongside the waterfront, and you can go right there and unload. If you sell them to the market, you got to get in a truck and go to New Orleans with them.

Q. During the period that you have been associated on company-owned boats, where have you been buying the groceries for that boat?

A. I bought some of them at Pitalo's Store, when I first started.

Q. When was that?

A. That's been a long time ago, it's been 10 or 11 years, I guess.

[fol. 375] Q. Mr. Williams, my question is, where have you bought the groceries while you were on a company-owned boat?

A. I bought them at Hall's Store.

Q. During the time you were on a company-owned boat, did you ever buy your groceries any place else?

A. No.

Q. Why not?

A. Well, I don't have any use to, any idea of going any place else. Wasn't no use to go.

Q. Have you ever had any limit of ice put on any company-owned boat that you were on?

A. No, sir.

Q. You mean you *always* got as much ice as you wanted?

A. I have always used my own judgment about it. If I would go out and make a trip and have ice left, I would just put enough ice back to make up what ice I used. If I had no ice in the boat, I taken the same amount I generally taken, that would be eight tons.

Q. Have there been times you could have used more ice and stayed out longer?

A. No, sir. If you go out and use eight tons of ice, it's time to come back.

[fol. 376] Q. Isn't it a fact that the quantity of ice aboard a vessel determines how long the vessel can be out?

A. Well, you can take ice at times, in the winter, take eight tons of ice and stay longer than you want to stay. In the fall of the year you can take ice and you can stay out, if you don't have too heavy a catch of shrimp, stay out eight or nine days.

Q. Let me put my question another way. If you took twenty tons of ice, you could stay out longer than if you took ten tons of ice. Is that correct?

A. Yes, sir, that is correct.

Q. Have you had occasions while you were working on company-owned boats to have information brought to your attention from the company that the plant was loaded and didn't want the boat coming in too soon?

A. What do you mean? With fish or shrimp?

A. With shrimp.

A. No, sir.

Q. With fish?

A. No, sir. They have a man down there—I just made three trips of fish, and they have a man down there who attends to that.

[fol. 377] Q. Are you discussing trash fish when you say "fish"?

A. That's right.

Q. Have there been any occasions that were brought to your attention when it was indicated that the plant was loaded with shrimp and didn't want any more?

A. Well, that's been so many years back, I don't think there's any fishermen in here could tell you that year.

Q. Haven't there been occasions when it was made known to you that they had so many small shrimp they only wanted larger size shrimp?

A. Well, that's the custom. That's all over.

Q. I didn't ask you if it was the custom. I asked you whether or not you didn't have that experience with this company.

A. They didn't specify that in that exact words. They would say, "Try to get larger shrimp if you can; if you can't, bring the small one."

Q. Mr. Williams, have you been hospitalized in the United States Marine Hospital in New Orleans, La.?

A. I have.

[fol. 378] Q. Was it during the time when you were a captain aboard one of the vessels owned by the DeJean Packing Co.?

A. The one I'm captain of now.

Q. I show you a document, being a document of the Department of Health, Education and Welfare of the United States Public Health Service, entitled "Master's Certificate of Service" and signed in a handwriting "Jack Williams."

A. That's right.

Q. And I ask you if that is your signature?

A. That is.

Q. I invite your attention to line 4 of that document.

By Mr. Morse: Would you mind letting me see that before you commence interrogating him?

By Mr. Nickman: I haven't offered it yet.

By Mr. Morse: I know, but I want to see it.

(Counsel hands to counsel opposite.)

OFFER IN EVIDENCE

By Mr. Nickman: May this be marked for identification?

By the Court: Yes.

[fol. 379] (Same marked Defendant's Exhibit 3 for Identification, which exhibit is not copied here because upon order of the Court the original exhibit will be sent up with this record.)

Q. Captain Williams, I invite your attention specifically to line 4 of this document which has now been identified as Defendant's Exhibit No. 3 and ask you to read what it says in print.

A. I tell you, I never went to but the third grade, and I'd rather somebody else read that.

Q. I ask you to read what line 4 says.

(Hands to witness)

A. (Reading) Wilfully and knowingly—

Q. No, Captain, line 4, right here.

A. (Reading) "Application was employed to—employed on aboard the vessel in captain of the—"—I can't pronounce that.

Q. Start with number 4. Can you read that?

A. Documents are—

Q. Can you see this line here?

A. "Appliance was on board the vessel."

Q. Can't you see this word, sir?

A. Yes, sir. What is that word?

[fol. 380] Q. Applicant.

A. "Applicant was employed on board the vessel in the—capture—"

Q. Capacity.

A. "Capacity—"

Q. Of.

A. "—Of captain."

Q. I also invite your attention to the right hand side of this document. Does it say here in a description of the vessel, "Name and class, Elmer Williams II." Is that correct?

A. Yes.

Q. Does it also indicate, "Name and address of local agent,"—what does it say?

A. "DeJean Packing Company."

Q. DeJean Packing Company?

A. That's right.

Q. Will you please read this statement which appears above the beginning of the statement.

A. Couldn't I get somebody else to read that for me?

By Mr. Morse: Give it to the Court, because he is ultimately passing on it, Mr. Nickman.

[fol. 381] By the Court: Mr. Morse, if that is the nature of an objection, I overrule the objection. You can cross examine as you see fit, Mr. Nickman.

By Mr. Morse: He just said he couldn't read it.

By the Court: He is entitled to cross examine him.

Q. I will read this statement for you, Mr. Williams, and you will look at the document and see whether I read it correctly. Does this document state, "Willfully and knowingly making or using a false certificate, with the intent of defrauding the United States Government, is punishable by a fine of \$10,000 or or imprisonment for 5 years, or both"? Does the document say that?

A. That's right.

Q. Now, below your signature does this statement appear?—Strike that. Just immediately above your signature does this statement appear?

"I hereby certify that the above information is true to the best of my knowledge and belief. . . ."

Does it say that?

A. That's right.

[fol. 382] Q. Now, you have a further signature at the bottom of the same document here.

A. Yes, sir.

Q. And before that signature, does this statement appear?

"I hereby certify that during the last 6 months I have served aboard the following vessels. . . ."

Does that also appear?

A. That's right.

By Mr. Nickman: Your Honor, the Government—No, I don't know whether we want to offer it at this time—

By the Court: If there's not any reason why you shouldn't offer it at this time—

By Mr. Nickman: —Unless Mr. Morse objects to offering documents during his part of the case.

By Mr. Morse: We have no objection to it. May we look at it?

(Same, Defendant's No. 3 for Identification, received in evidence as Defendant's Exhibit No. 3.)

(Whereupon the Court recessed for 10 minutes.)

[fol. 383]

After Recess

(Mr. Nickman continues)

Q. This vessel, the Elmer Williams II, for the purpose of establishing this for the record, that was a company owned boat?

A. That's right.

By Mr. Nickman: No further questions.

Redirect examination.

By Mr. Morse:

Q. Captain, did you fill in this in your own handwriting?

A. No, my boy George did.

Q. This exhibit, Defendant's Exhibit No. 3, is what I'm talking about. Did your son George fill that one in?

A. The one I signed my name on there?

Q. Yes.

A. That's right.

Q. You had difficulty in reading this when it was presented to you by Mr. Nickman?

A. That's right.

[fol. 384] Q. And you would have had difficulty in filling it out of your own knowledge, these—

A. I couldn't have done it.

By Mr. Morse: That's all.

Recross-examination.

By Mr. Nickman:

Q. Mr. Williams, at the time you were admitted to the hospital, weren't you asked by the admitting officer whether or not the statements that you made here were true?

A. That's right.

By Mr. Nickman: That is all.

By the Court: You may stand aside.

(Witness excused)

[fol. 385] JOHN JOSEPH ROSS, called as a witness and having been duly sworn, testified as follows:

Direct examination.

By Mr. Morse:

Q. Your name is Captain Joe Ross?

A. My name is John Joseph Ross, known as Joe Ross.

Q. You had rather be known as that rather than Captain, hadn't you, Joe? What business have you been engaged in practically all your life?

A. I been engaged in shrimp fishing up until recently, in trash fishing. I shrimp fished until the time I got out of school, which was when I was 16 years old, up until 1955.

Q. From the time you were 16 years old, at any time were you furnished with a boat by Mr. Elmer Williams to run on as captain?

A. Yes, I run boats before. Before I run boats for Elmer Williams, I run a boat for my daddy and worked for Elmer Williams.

[fol. 386] Q. How long ago?

A. That was when I was about 18 years old, and I'm 44.

Q. How long did you work on that boat or on boats that the Williams Packing & Navigation Company furnished or that Mr. Elmer Williams furnished?

A. I run the Eustis McManus. I don't remember which year it was. It was a company-owned boat. I run it for two years. I also run the Nellie L. for them one summer. I don't remember what summer that was.

Q. Joe, when you became a captain of the boat, how was the boat delivered to you, by whom? The Eustis McManus.

A. I asked Mr. Elmer Williams for the Eustis McManus to freight with. At that particular time I was running the trawl Evelyn R. At the time I was running the trawl Evelyn R. was owned by the Williams Packing Company. I run the Eustis McManus two years. I was buying the Evelyn R. at the time.

Q. When the boat was turned over to you, was it rigged up?

A. No, I had to get trawls and boards and stuff like that [fol. 387] from the trawl maker.

Q. Who orders those?

A. I order them.

Q. And the size and length of the trawl and length of the cable and everything, the rig,—who ordered the rig?

A. That's left up to each individual captain of every boat.

Q. Are boats rigged differently? Are various boats rigged differently?

A. Yes, sir, they are rigged differently.

Q. And do boats of the same size have different length trawls?

A. Yes, sir.

Q. And boards?

A. That's right.

Q. Now, when the boat was turned over to you, who selected the crew?

A. I selected them.

Q. Did Mr. Williams or anyone connected with the Williams Packing & Navigation Company have anything to do with selecting the crew?

A. No, sir.

[fol. 388] Q. Who determined the time when the boat would go out and the ground that it would fish on and when it would return?

A. Well, I always done that myself, and one thing I would like to get straight on the record.

Q. Yes.

A. —Is when you go up before the—in the courthouse to take a boat's papers, you swear that you are going to be the master and that you are going to run that boat and not violate no laws with it when you take it. That don't mean you are taking orders from anybody. That means you are going to run it and you are going to do it yourself. You swear that right over here across the hall in the Customs House.

Q. You mean upstairs?

A. Upstairs, yes.

Q. When you got the boat, you took out the master's license, didn't you?

A. That's right.

Q. And then you took orders from nobody, did you, Joe?

A. No, sir, didn't take orders from nobody.

[fol. 389] Q. When you buy your groceries and fuel and ice, who determines about buying that?

A. That was left up to the captain to see that he had the boat adequately supplied with fuel, ice and groceries to make a trip.

Q. A lot of times the crew consists of the captain and two members or the captain and one member?

A. I have run both ways.

Q. Run both ways. Now, in ordering the groceries, is there any supervision made in ordering of the groceries for the boat?

A. Usually the cook orders them. One fellow do the cooking and he usually orders the groceries, and the captain may tell him what kind of stuff we would like to eat or some of the other crew members suggest what they'd like to eat.

Q. If you want chicken or bacon or ham or whisky or tobacco or anything, is there any restriction put on the—

A. Not by the company. Never no restrictions put on any boat that I run by the company.

Q. Who was the first man to discover night fishing or [fol. 390] catching brownies?

A. I was credited with that.

Q. Where did you start catching them?

A. Out east of Chandeleur Island.

Q. About when was that, Joe?

A. I don't remember the year that that was.

Q. Were you at that time a member of the old Gulf Coast Shrimpers and Oystermen's Association?

A. I was.

Q. Was any effort made to prevent you and others from catching fish at night out in the Gulf by the Association?

A. There was. There was a lot of discussion in the Association to try to stop us from working at night.

Q. Now, when could you catch the most brownies? Would it be in the daytime or nighttime?

A. For some reason that no one doesn't know prior to the year that we caught these brownies at night, we caught them in the daytime.

Q. Would you catch them in the same quantity in the daytime that you would at nighttime?

A. Years before—Let me finish answering that question. [fol. 391] Years before, and *noone* knows the answer, we used to catch these brown shrimp in the daytime. Down in Texas the fishermen told us they could only catch them at night. I talked to some of the fishermen from down there, and they couldn't understand how we could catch these particular shrimp in the daytime when they never could. That went on, that fishery went on I'd say five or six years or maybe more. We operated in the daytime. Suddenly one year for no reason we know of we couldn't catch them in the daytime. We could find them but we could never catch them. In that particular year I kept trying and trying and trying, and eventually I tried at night. And we caught them at night that year. Why that happened the Wild Life and Fish Service *can't* answer. I asked them. Mr. Harvey I asked personally. They don't know the answer. You—Uncle *Same* doesn't know the answer, why we could suddenly catch them at night instead of day.

Q. Joe, when you would buy the ice, from whom would you buy it?

[fol. 392] **A.** I bought it from Biloxi Freezer recently, the last few years we worked there. Before that I used to buy from the Crystal Ice Company.

Q. Who had the best ice?

A. Biloxi Freezer, in my opinion. We used to fuss when ice that come down—You could laugh about ice, but you ain't ever had to shave it. When ice comes down and it's

not clear and it freezes back up where the men can't take and shave it up, the crew fusses about the ice that they get. We have that trouble right now over in Pascagoula. We had it in the last past year. I was buying ice at Skippy Walters where I could get it cheaper than I could on the other side, and the crew refused to handle it, said it was just too hard to handle. All ice is not alike.

Q. You have got your own boat now?

A. That's right.

Q. You are not working or fishing for Williams?

A. I work for trash fish now.

Q. And on an independently owned boat?

A. Independently owned.

[fol. 393] Q. You have, I believe, one of the largest boats in the Gulf for catching fish?

A. It's the largest that is owned in Biloxi.

Q. What size is that boat?

A. 82 foot.

Q. How many engines does it have in it?

A. Two General Motors diesels in it.

Q. How many rigs?

A. It just pulls one large rig and one small rig.

Q. Did you get hung up in that rig?

A. Yes, I got caught in the winch on the boat.

Q. Is that the reason your arm is in a sling?

A. That's the way my arm got broke, yes.

Q. When you were working as captain on the Eustis McManus, did you consider yourself as being an employee of Williams Packing & Navigation Company?

By Mr. Nickman: Object.

By the Court: Yes, sustain the objection. I'll let—

Q. Were you an employee?

[fol. 394] By the Court: I'll let him answer for the record, but I sustain the objection for the reason I think it a question for the Court to determine.

A. Well, when I was working on the McManus, that's quite a few years back, before they had the Government trial of the Gulf Coast Fishermen and Oystermen's Association. We assumed that we was working for the DeJean Packing Company at that time. I think that is who owned

the company then, maybe it was the Williams, I really don't know, but in 1951 I think it was, and I was still working for Williams Packing & Navigation Company, over in the Internal Revenue office in Gulfport they attempted to collect self-employment tax from me, and I refused strongly to pay it, and verbally. And, I don't know the man's name but I can take you to Gulfport and point him out, he told me if I didn't pay self-employment tax they would sell my home to collect it. In the Gulfport office of the Internal Revenue. I can show you the man. I don't know his name.

Q. Did you ever pay any self-employment tax?

[fol. 395] A. Yes, I paid it since it was started. I paid self-employment tax since the Federal Government said that we was self-employed, that fishermen was self-employed.

Q. When was that? Back in '51?

A. Yes, back around '51 when the law went in effect, before the trial of the union.

Q. What about the social security? Who paid the social security?

A. I paid it myself.

Q. Who is paying it now?

A. I am.

Q. Who paid it during the time you were working on the boat Eustis McManus?

A. I don't think it was collected at that time. The law hadn't been changed to include fishermen. We was outcasts at that time.

Q. Did Elmer Williams or anyone connected with Williams Packing & Navigation Company ever give you or in your presence the crew members any orders about when to take out a boat and when to come in and when to fish [fol. 396] and unload fish or any orders of any description?

A. No, they never did in my presence, not any crew member. Heck, I had a lot of trouble with the crew myself. Sometimes you tell them you wanted to go out and they'd just up and take their clothes off and quit. They didn't give you no notice they was quitting.

By Mr. Morse: I believe that's all.

Cross-examination.

By Mr. Nickman:

Q. Mr. Ross, you say you have been paying a self-employment tax. Is that correct?

A. That's right. That's what it says on my income tax.

Q. You are on a company-owned boat or an independent boat?

A. I own the boat.

Q. You own the boat?

A. That's right.

Q. Now, this time when you say sometimes you had discussions or disputes with the crew, you couldn't get along or something and they would just quit,—

[fol. 397] **A.** That's right.

Q. —When was that?

A. You mean each instance, every instance? They ain't enough paper here to write them all down, I don't guess.

Q. Can you give me any instances during the year 1953, '54 or '55?

A. I couldn't remember that far back.

Q. Were those on company-owned boats or independent boats?

A. That was an independent boat.

Q. Now, when you got your master's certificate to sail any of these vessels, your master's papers, did you pay any fee?

A. No, sir.

Q. Have you ever been on any other kind of vessel besides a fishing vessel?

A. No, sir.

Q. Do you know or are you familiar with the fact that the master of any kind of vessel has to have papers?

A. Yes, I know they got to have papers.

Q. Are you familiar also with the fact that the master of any vessel whether he works for a company or not is [fol. 398] in command of a vessel?

A. That's right.

Q. Now, Mr. Rosa, let's be fair about this. When you select a crew on a trip, don't you want a crew that you can work with?

A. Naturally.

Q. And isn't it more or less expected that you will have to have a crew that can do the job and bring the catch in?

A. Yes.

Q. You don't have to bother Mr. Williams with those matters, do you?

A. No.

Q. Doesn't Mr. Williams or any of his representatives put enough confidence in you that you know what the boat needs? Is that right?

A. That's right.

Q. So if the boat needs a trawl or something else, you are picked because you know what the boat needs. Right?

A. You're supposed to know.

Q. You wouldn't get on the boat if you didn't. Isn't that so?

[fol. 399] A. I wouldn't say that. I know a lot of fishermen that don't know, and they are on boats.

Q. I know lawyers that don't know too, and they are still lawyers.

By Mr. Morse: So do I.

Q. Now, during the time you were on company-owned boats, Mr. Ross, did you buy your groceries at Hall's grocery?

A. I don't think so, no.

Q. Tell us the place where you bought them.

A. I bought groceries at Pitalo's Grocer Store.

Q. What years? Was it before 1946?

A. I really don't know. I would have to go look at records and tell you which one I worked on the Eustis McManus.

Q. In other words you don't remember?

A. Just a minute now, let's see. I had my boat built in 1937 and I run it a year. Approximately around '40, around 1940 I think it was when I was running the Eustis McManus, somewhere along in that period of years. I'm not certain which years it was that I run the Eustis McManus.

[fol. 400] Q. Do you happen to know when the Hall's Grocery Store was first opened?

A. No, sir, I don't know when it was first opened. Could I tell you one other thing about Hall's Grocery Store?

Q. Yes.

A. You heard it in the record just now that I have my own boat, independent boat. Whenever it docks in Biloxi for any type of repairs, we have to come over to Kennedy Marine for repairs, all the groceries is bought at Hall's. I don't have to buy them there. Can I tell you why I do?

Q. I would like to ask you one question before you do. Where do you moor your vessel when you come into Biloxi?

A. That's a good question. For the first part of it, there's only two places I can moor in Biloxi besides on Back Bay on the front. That's at Mavar's Packing Company the only one got enough water for me to get to, besides the City Pier, the community pier. I can't go to any of the other plants.

[fol. 401] Q. That's because of the size of your vessel?

A. That's because of the size of the vessel, that's right.

By Mr. Morse: Tell him why you—

By Mr. Nickman: Now, just a minute. This is cross-examination.

Q. Mr. Ross, were you working for the DeJean Packing Company from September of 1943 to July of 1944?

A. I don't really know the answer to that question.

Q. You don't remember?

A. I never said I didn't remember. I don't know what your question means.

Q. My question is, were you working on a company-owned boat at the DeJean Packing Company from the period September of 1943 to July of 1944?

A. Did you say the DeJean Packing Company?

Q. Yes, or the Williams Packing & Navigation Company, either one.

A. I was working—

Q. On a company-owned boat.

A. I was—I don't know the answer to that question. I was—I can answer it this-way: I was buying the trawler Evelyn B. from the DeJean Packing Company.

[fol. 402] How many years it took me to pay for it, I don't know the answer to that question. It could be looked up in court records in the Customs House records, showing when the boat was put in my name. Had that boat been in the DeJean Packing Company's name at that time that I was a verbal agreement to buy it—I was working for DeJean; the boat was owned by DeJean while I was working for Williams. Had the transaction already taken place where the boat was turned over to me, then I was working for myself.

Q. What year was that?

A. I don't know, but it's on record in the Customs House.

Q. Do you recall whether you were working for the DeJean or Williams Packing Company from August of 1944 to August of 1945? That's a full year period.

A. Yeah, I was working for Williams Packing & Navigation Company selling shrimp to them.

Q. Were you on a company-owned boat at that time? That was during the war.

A. During the war? . . . Well, let's put it this way: Probably in that year, those years, I was buying the trawler [fol. 403] Mary Margaret. The trawler Mary Margaret was in my name, the papers. The boat belonged to me. I bought it from Taltavull. And DeJean Packing Company helped me to have this boat rebuilt. Is that what you are asking?

Q. You say this was the Mary Margaret?

A. Yes, that's right. I bought it outright from the Taltavull Canning Company, Mr. Bernard Taltavull.

Q. Is that the vessel that was sunk by striking a submerged piling?

A. Yes, that's the one the Government didn't want to pay for after they put the piling in the way.

Q. You consider yourself a good navigator, Captain?

A. If you got a record there, you will notice—I was not captain at that time.

Q. Well,——

A. At the time the vessel sank I was not the captain. I was present on the boat as a crew member.

Q. Who was the captain? Do you know?

A. Yes, I know. Jack Semski was captain.

Q. Who was he working for?

A. As captain?

[fol. 404] Q. Yes.

A. I-guess that's what this trial is about. I ain't never found out who I'm working for yet.

Q. You say you owned the vessel but you were just a crewman?

A. That's right. I owned it and I was a crewman. Now, while I was a crewman, was I employed by DeJean as you are implying I was employed by DeJean while I was a crew on this boat? Or was I employed by the captain. Who was I employed by?

Q. I'm curious to know how you are a crewman on the vessel if you owned it?

A. I'm a crewman on the boat I own right now. When I go out, I'm a crew on the boat. My brother is the captain.

Q. This is an independent boat?

A. That's right. I own it, me and my wife, independently. No one else owns any part except the mortgage, General Motors.

By Mr. Nickman: No further questions.

Redirect examination.

By Mr. Morse:

Q. When you come in and moor in Biloxi, where do you go [fols. 405-415] and get your groceries?

A. We order our groceries from Hall's for the simple reason that they have a delivery truck that delivers your groceries, pick up bottles you have on the boat, go anywhere and get any type of groceries you order and they don't have, keep a supply of groceries that boats usually buy that you don't get at other stores. Now, you can go to a supermarket and probably get them for less money, but involving the time it takes, we ain't got that time to do that. We got too much time on the boat. We can go to a telephone and order from Hall's Grocery and get everything we need.

Q. Will they charge them to you?

A. That's right. It's a open charge account.

By Mr. Morse: I think that's all.

By Mr. Nickman: I think we would like the record to note, sir, that the witness' testimony relates to his activities on independent boats.

By the Court: Very well.

(Witness excused)

[fol. 416] TESTIMONY OF EDID LONGON

Cross-examination.

By Mr. Morse:

Q. Whom did you go to see to get this boat, Captain?

A. Mr. Elmer.

Q. Did you know anything about the Williams Packing & Navigation Company?

A. No, I don't believe at that time there was any Williams Navigation Company.

Q. You didn't know that they were organized in 1944?

A. No. No, sir.

[fol. 417] Q. So you don't know whether you got it from Mr. Elmer Williams as president of Williams Packing & Navigation Company or not?

A. No, sir.

Q. When you got the boat, who selected the crew?

A. Me.

Q. Did Mr. Williams or anybody *connection* with Williams Packing & Navigation Co. or DeJean or anyone else tell you who to put on ~~as~~ crew members?

A. No, sir.

Q. Were you told when to go out fishing?

A. No, sir.

Q. Were you told where to fish?

A. No, sir.

Q. Were you told how to fish?

A. No.

Q. Were you told when to come in?

A. No, sir.

Q. Who made that decision?

A. The captain.

Q. And whose decision alone was that?

A. Well, it was my decision. I was the captain.

[fol. 418] Q. Your decision?

A. Yes, sir.

Q. Did Mr. *Williams* ever tell you or anybody in connection with either DeJean or Williams Packing & Navigation Co. ever tell you anything to do?

A. No, they never did say anything to me. The only thing when I first took the boat, he asked me to try to stay with his bunch. We was always staying with the bunch of freight boats. He had a bunch of freight boats and we *always* had a bunch of freight boats around there with us.

Q. Now, who ordered the groceries, the fuel and the ice? You didn't take ice, did you?

A. Didn't take no ice.

Q. Who ordered the groceries and fuel?

A. My cook.

Q. Did Mr. *Williams* tell you how much?—

A. No, sir.

Q. —You could get, or how much to take out?

A. No, sir.

Q. You could take out beer or wine?

A. I guess I could.

[fol. 419] Q. Tobacco and everything?

A. I guess we could. We never did.

Q. Did Mr. *Williams* from the time you took the boat or anybody else connected either with Williams Packing or DeJean ever supervise anything that you and the crew members did?

A. No, sir.

Q. About the rigging, who decided what kind of rigging you wanted on the boat?

A. I had to decide that *myself*.

Q. You were known as a good fisherman in these waters, weren't you?

A. No, not at the present time then.

Q. You were known then as a good fisherman who knew how to navigate a boat?

A. Yes, sir.

Q. You knew where to go and fish?

A. Yes, sir.

Q. And you selected a crew member that you thought was competent?

A. Yes, sir.

Q. During the entire time that you worked for DeJean [fol. 420] was any discussion ever had with you about paying social security taxes for you?

A. No, sir.

Q. As a matter of fact, during 1958 your wife worked in the factory?

A. Yes, sir.

Q. —Of DeJean during the strike they had down there?

A. That's right.

By Mr. Nickman: Objection. That is outside the scope of my direct examination.

By the Court: Well, I will not sustain it on that ground. I sustain it on a different ground, that it is irrelevant and immaterial.

By Mr. Morse: Very well.

Q. Now, after you started working there, when they shared up how would you get your share?

A. Well, I used to get my share and my crew's share.

Q. By check?

A. By check.

Q. From whom?

A. From—uh—

[fols. 421-422] Q. Lu Frieberger?

A. Lu Frieberger. And we used to give the boat a share and the rig a share and share with my partner and used to go cash the check.

Q. You just had one?

A. One check.

Q. You just had a one man crew?

A. Yes, sir.

Q. Because it was a small boat?

A. A small boat.

Q. Do you know whether that check was drawn on Williams Packing & Navigation Company or not?

A. No, sir.

Q. You don't know who gave——

A. —I don't know how to read.

Q. You know how to figure though?

A. A little bit, but not too much.

Q. But you would get the check and you and your partner would go and cash it?

A. Yes, sir.

Q. You and your crewman?

A. Yes, sir.

[fol. 423] LUCIUS FRIEBERGER, Re-called as a witness and having previously been duly sworn, testified as follows:

Direct examination.

— By Mr. Morse:

Q. You were sworn, were you, Mr. Frieburger?

A. Yes, sir, on the first day of court.

By Mr. Morse: I'm going to hand you some official documents and we would like to have them marked and introduced. We didn't have time to photostat them this morning, and will have Mr. Frieburger photostat them. Here's the mortgage on the two boats; here's the two notes; here's [fol. 424] a letter from the bank; here's the minutes.

(Hands to counsel opposite)

Q. Mr. Frieburger, you were asked yesterday, and Mr. Williams when he was on the stand, about two boats, the Robert Favret and the Jim Eastland.

A. That is correct.

Q. —As to whether or not they were purchased by the Williams Packing & Navigation Co., and I believe you stated that they were.

A. I did.

Q. And at Mr. Nickman's request, he requested the papers on it, and as I recall I stated to Mr. Nickman that I had the papers in my safe in Gulfport. Did you hear me make that statement?

A. That is my recollection, yes, sir.

Q. After he asked you the question?

A. Yes, sir.

Q. Since that question has come up, I want to hand you a chattel deed of trust of the Williams Packing & Navigation Co. to the Peoples Bank of Biloxi with W. H. White, Trustee. Do you recognize that?

[fol. 425] A. Yes, sir.

Q. The date of it is when?

A. April 19, 1956.

Q. What does it cover?

A. It covers the oil screw vessel Jim Eastland, Official No. 252993; and the oil screw vessel Robert B. Favret, Official No. 249235.

Q. Where was that instrument recorded?

A. That was recorded in Gulfport by the chancery clerk, in the chancery court.

Q. Who prepared that instrument?

A. The Peoples Bank of Biloxi.

Q. Did the Williams Packing & Navigation Co. have anything to do with the preparation of it?

A. No, sir.

Q. Now, what was that chattel mortgage given to secure?

A. To secure a promissory note dated April 19, 1956.

Q. What is this I hand you?

A. That is the promissory note dated April 19, 1956.

Q. Was any payment made on that promissory note?

A. Yes, there was a payment made on Oct. 25, 1956.

Q. Of how much?

[fol. 426] A. \$1,000.00.

Q. Was any interest paid on it?

A. Yes, there was \$281.25 interest paid. That was interest to Oct. 19, 1956.

Q. Was that not renewed by additional note for a smaller amount?

A. Yes, sir, it was renewed for \$11,000.00. Now, there appears to be—there's another payment was made on this which is not recorded on the back of this note.

Q. Are those instruments all of them marked "Paid"?

A. Yes, sir, they are marked "Paid." Signed by "M.D.," the initials "M.D.," someone at the Peoples Bank with a rubber stamp.

Q. All right. In 1957 did the Williamis Packing & Navigation Company receive a letter from the Peoples Bank?

A. Yes, sir.

Q. Is that the original letter?

A. This is the original letter.

Q. And the substance of that letter is what?

A. Is a demand for payment of the mortgage.

Q. Of the note?

A. Of the note.

[fol. 427] Q. Secured by the mortgage?

A. That's right.

Q. How was that done?

A. By check.

Q. By whose check?

A. (No answer)

OFFERS IN EVIDENCE

By Mr. Morse—Your Honor, we want to offer these in evidence and ask that they be marked and that Mr. Frierberg be permitted to photostat them, give the Government a copy of the photostat and give a copy to the court reporter.

By Mr. Nickman: Are you making an offer of this?

By Mr. Morse: I'm going to offer the entire matter just as soon as I get through with them.

By Mr. Nickman: May we have the offer made seriatum instead of bulk?

By Mr. Morse: Oh, yes.

By the Court: As I understand, Mr. Nickman, you want a separate offer on each one?

By Mr. Nickman: We would like the Court to pass individually seriatum as to each document.

By Mr. Morse: We will seriatum for you.

[fol. 428] A. I didn't answer that question.

Q. That's all right.

By Mr. Morse: We offer chattel deed of trust of Williams Packing & Navigation Company dated April 19, 1956 covering the motor vessel Jim Eastland and the motor vessel Robert B. Favret, which has been recorded in Volume 176, pages 31-32 of the record of chattel deeds in Harrison County, Mississippi.

By Mr. Nickman: No objection.

By the Court: Let it be marked.

(Same received in evidence and marked Plaintiff's Exhibit No. 28, which exhibit is not copied here because upon order of the Court the original exhibit will be sent up with this record.)

By Mr. Morse: We next offer in evidence note dated April 19, 1956, of the Williams Packing & Navigation Co., Inc., in the sum of \$12,500.00, due six months after date, marked "Paid," as an exhibit.

By the court: Let it be marked.

(Same received in evidence and marked Plaintiff's Exhibit No. 29, which exhibit is not copied here because upon order of the Court the original exhibit will be sent up with this record.)

[fol. 429] By Mr. Morse: We next offer a note of Williams Packing & Navigation Co., Inc., dated April 19, 1957, in the sum of \$11,000.00 due six months after date, which is marked "Paid" 7/23/57.

By the Court: Let it be marked.

(Same received in evidence and Marked Plaintiff's Exhibit No. 30, which exhibit is not copied here because upon order of the Court the original exhibit will be sent up with this record.)

By Mr. Morse: We next offer letter from Peoples Bank, Biloxi, Mississippi, dated July 19, 1957, signed "Glenn L.

Swetman" demanding payment of the loan of \$12,500.00 as reduced to \$11,000.00.

By Mr. Nickman: To whom is that letter addressed?

By Mr. Morse: Addressed to Williams Packing & Navigation Co., Inc., East Beach, Biloxi, Miss., Attention Mr. Elmer Williams, President.

By Mr. Nickman: The Government objects to that document on the *ground* that it is correspondence to Williams Packing & Navigation Co., and Your Honor recalls in previous hearings in this matter that the Government attempted to ascertain whether there was any correspondence from or to the Williams Packing & Navigation Co. The [fol. 430] Government was advised that there was no such correspondence initially, and later a statement was made by Mr. Frieberger that he had discovered some other correspondence, which he turned over to us, which rather curiously enough was all self-serving for Williams Packing & Navigation Company. But this letter was never shown to the Government, and moreover, after the informal request for such material and such documentary data, Your Honor passed on a motion made by the Government in respect to such matters, and Your Honor said the Government had the full right to see all the records pertaining to the Williams Packing & Navigation Company. This document being offered at this time, as we see it, in contravention of this Court's order, we very strenuously object to its reception in evidence.

By Mr. Morse: In response to that, I want to state that this letter, together with these minutes, have been in my safe in a file in my safe; and as the Court knows, these are my papers. They were turned over to me and there was no order directed to me to produce *many* papers, and I could have ignored any order, being confidential matters. And [fol. 431] we brought it to the Court's attention when it was brought out here by the Government yesterday.

By the Court: Well, I will overrule the objection. I think it goes to the weight of the testimony, rather than to its admissibility. I think that under the court order if counsel had known that it was in his safe and recognized that he had it there, it was his duty to have presented it because it is correspondence from the bank to Williams Packing & Navigation Co. But I think the objection goes to its weight

rather than to its admissibility, and for that reason I overrule the objection.

(Same received in evidence and marked as Plaintiff's Exhibit No. 31, which exhibit is copied here below.)

PLAINTIFF'S EXHIBIT No. 31

**The Peoples Bank
Biloxi, Miss.
July 19, 1957
Our 61st Year**

**William Packing and Navigation Co., Inc., East Beach,
Biloxi, Mississippi.**

Attn: Mr. Elmer Williams, President.

[fol. 432] DEAR MR. WILLIAMS:

It has now been fifteen months since we made you a temporary loan of \$12,500.00 secured by two boats, the Robert B. Favret and the Jim Eastland. This note has only been reduced \$1,500.00 during this period of time and on our last examination by the State and FDIC Examiners we were criticized on this paper because of the apparent slowness in liquidating and because of lack of insurance coverage. Under the circumstances, we desire to give you notice at this time that we would like that this note be liquidated at the earliest possible moment.

Thanking you for your prompt consideration, I am Yours
very truly, /s/ Glenn L. Swetman, Vice-Pres. & Cashier.

GLS:fb

[fol. 433] Q. I hand you here a document. Explain what that is.

A. These are the minutes of the annual meeting of the stockholders and directors of the Williams Packing & Navigation Company, Inc., held on September 15, 1951, and it concerns a resolution adopted by the company in September of 1950 with reference to entering negotiations with the DeJean Packing Company, a partnership, for the purchase of two boats, namely, the Robert B. Favret and the Jim Eastland.

Q. Pursuant to that resolution were those two boats purchased by Williams Packing & Navigation Co. from the DeJean Packing Co.?

A. Yes, sir, they were purchased.

Q. And what was the date of the purchase?

A. They were purchased on March 4, 1952.

By Mr. Morse: We offer this in evidence and ask it be marked and substitute a photostat.

(Same received in evidence and marked as Plaintiff's Exhibit No. 32, which exhibit is copied here below.)

[fol. 434] PLAINTIFF'S EXHIBIT NO. 32

Minutes of the Annual Meeting of the Stockholders and Directors of Williams Packing and Navigation Company, Inc., at the office of the Company in Biloxi, Mississippi on September 15, 1951 as Provided by the Charter

There were present all stockholders and directors of the company. The stockholders and directors being identical, it was resolved that the meeting be joint.

Mr. Elmer Williams presided at the meeting, and Mr. Lucius Freiberger acted as Secretary of the meeting.

The following officers and directors were chosen to serve for one year and until the annual meeting of September 15, 1952, to-wit: Elmer Williams, President; Carroll Williams, Jr., Secretary and Treasurer; Lucius Freiberger, Director.

The President announced to the meeting that pursuant to the resolution of the company adopted at its September 1950 meeting, he had entered into negotiations with DeJean Packing Company, a partnership, for the purchase of boats; namely, the "Robert B. Favret" and "Jim Eastland", for the prices of \$15,000 for the "Robert B. Favret" and \$12,000 for the "Jim Eastland". Upon motion duly made and [fol. 435] seconded and unanimously adopted, Mr. Elmer Williams, President, was authorized to purchase from DeJean Packing Company, the above named boats, using the surplus funds of the Company on hand.

There being no further business, motion was duly made and seconded and the meeting adjourned.

/s/ Lucius Freiberger, Secretary of the Meeting.

Q. On March 31, 1956, was a special meeting of the Williams Packing & Navigation Co. held, and do you recognize that as the copy of the minutes? (hands to witness)

A. Yes, sir, these are the minutes. I recognize the signature and everything on it.

Q. The resolution was to do what, as shown on the face of it?

A. To borrow money from the Peoples Bank of Biloxi and and to give them a mortgage and a note with these two vessels as security.

Q. Pursuant to the resolution was that carried out?

A. Yes, sir.

[fol. 436] By Mr. Morse: We offer this in evidence.

(Same received in evidence and marked as Plaintiff's Exhibit No. 33, which exhibit is copied here below.)

PLAINTIFF'S EXHIBIT No. 33

Minutes of Special Meeting of Stockholders and Directors of Williams Packing and Navigation Company, Inc., at the Office of the Company in Biloxi, Mississippi, Held on March 3, 1956.

A special called meeting of the directors of the company held on March 3, 1956. There were present all directors of the company. Elmer Williams, President, stated that the company was in need of funds and that the Peoples Bank of Biloxi had agreed to loan the company the sum of Twelve Thousand Five Hundred Dollars (\$12,500.00), taking as security therefor a note executed by the company and a mortgage on the M/V Jim Eastland #252993, and the M/V Robert B. Favret #249235.

Thereupon the following motion was duly made, seconded and unanimously adopted:

Be it resolved, by the directors of Williams Packing [fol. 437] and Navigation Company, Inc., that Elmer Williams, President of said company, be and he is hereby authorized, empowered and directed to borrow the sum of \$12,500.00 from Peoples Bank of Biloxi, Biloxi, Mississippi, and to execute the company's note in said amount, bearing interest at the rate of — % per annum, and to execute and deliver mortgages and securities that may be required by the bank, pledging and mortgaging the M/V Jim Eastland #252993 and the M/V Robert B. Favret #249235, as security for said loan.

There being no further business the meeting adjourned.

/s/ Elmer Williams, President.

/s/ Carroll E. Williams, Jr., Secretary.

Q. What is that I hand you?

A. These are the minutes of the corporation meeting held on July 22, 1957. It was a special called meeting.

Q. State whether or not that meeting, if the minutes show on its face if it was called pursuant to the letter [fol. 438] of the Peoples Bank of Biloxi, dated July 19, 1957.

A. That is correct. It cites that letter right here on the face of this paper.

Q. It is a copy of the letter in the resolution?

A. A copy of the letter in the resolution.

Q. And the resolution itself provides—?

A. The resolution provides, says, the company is unable at this time to pay the loan due the Peoples Bank and that DeJean Packing Company, a co-partnership, has made an offer to purchase the Robert B. Fayret and the Jim Eastland at what they consider a reasonable and fair market value.

Q. Was that resolution carried out?

A. Yes, sir.

Q. And was that mortgage, were those boats purchased from the Williams Packing & Navigation Company, if you know.

A. Yes, sir, they were.

By Mr. Morse: We offer that.

(Same received in evidence and marked as Plaintiff's Exhibit No. 34, which exhibit is copied here below.)

[fol. 439] PLAINTIFF'S EXHIBIT NO. 34

Minutes of Special Meeting of Stockholders and Directors of William.s Packing and Navigation Company, Inc., at the Office of the Company in Biloxi, Mississippi, held on July 22, 1957

A special meeting was called and all stockholders and directors and officers of the company were present.

Elmer Williams, President of the company, presented to the stockholders and directors a letter from The Peoples Bank of Biloxi, dated July 19, 1957, signed by Mr. Glenn L. Swetman, which reads as follows:

"The Peoples Bank of Biloxi
Biloxi, Miss.
July 19, 1957
Our 61st Year

William Packing and Navigation Co., Inc.
East Beach,
Biloxi, Mississippi

Attn: Mr. Elmer Williams, President

DEAR MR. WILLIAMS:

It has now been fifteen months since we made you a temporary loan of \$12,500.00 secured by two boats, the Robert B. Favret and the Jim Eastland. This note has [fol. 440] only been reduced \$1,500.00 during this period of time and on our last examination by the State and FDIC Examiners we were criticized on this paper because of the apparent slowness in liquidating and because of lack of insurance coverage. Under the circumstances, we desire

to give you notice at this time that we would like that this note be liquidated at the earliest possible moment.

Thanking you for your prompt consideration, I am

Yours very truly,

/s/ Glenn L. Swetman, Vice-Pres. & Cashier.

GLS:fb."

Thereupon the following motion was duly made, seconded, and unanimously adopted:—

Be it Resolved, by the stockholders and directors of the Williams Packing and Navigation Company, Inc. that said company is unable at this time to pay the loan due the Peoples Bank of Biloxi, and that DeJean Packing Company, a co-partnership composed of Elmer Williams, Carroll E. Williams, Jr., Mrs. Cornelius Williams, and Mrs. Ophelia Williams, have made an offer to purchase the M/V Robert B. Favret # 249235, [fol. 441] for the sum of \$9,962.50, which is the fair and reasonable market value of said motor vessel; and the M/V Jim Eastland # 252993, for the sum of \$9,618.16, which is the fair and reasonable market value of said motor vessel. That out of the proceeds of the sale of said boats the President is authorized to pay off the mortgage due The Peoples Bank of Biloxi, Mississippi, mentioned in its letter of July 19, 1957, so that title to said boats will be free of said mortgage.

Be it Further Resolved, that Elmer Williams, President of Williams Packing and Navigation Company, Inc., be and he is hereby authorized for and on behalf of the said corporation to sign a Bill of Sale to the DeJean Packing Company and its partners, conveying title to said boats and to affix the seal of the said corporation to said Bill of Sale.

Their being no further business the meeting adjourned.

/s/ Elmer Williams, President

Attest:

/s/ Carroll E. Williams, Jr., Secretary.

[fol. 442] COLLOQUY BETWEEN COURT AND COUNSEL.

By Mr. Nickman: The Government objects to that document identified and offered as Plaintiff's Exhibit No. 34, being or purporting to be a document entitled "Minutes of Stockholders and Directors of Williams Packing & Navigation Co., Inc., at the office of the Company at Biloxi, Held on July 22, 1957." Our objection is predicated upon this ground: that approximately one month ago the Government counsel, accompanied by co-counsel, called at the office of opposing counsel at the suggestion of opposing counsel, Mr. Morse, who indicated freely, without any request by the Government, that he would allow the Government to inspect all of the minutes of the Williams Packing & Navigation Company. The minute book of that corporation was then at that time turned over to Mr. Krysa, who is associated with me for the Government in this case. Mr. Krysa inspected that book and did not see either of these two documents which appear as Exhibit No. 34. As a result the Government was satisfied that the books shown to it represented all of the minutes, and Mr. Morse was so asked.

By Mr. Morse: I was what?

[fol. 443] By Mr. Nickman: You were asked whether this contained all the minutes.

By Mr. Morse: I was not so asked.

By the Court: Very well, one at the time. Go ahead.

By Mr. Nickman: Upon reliance that this represented all of the minutes, the Government has had no opportunity to investigate all of the details and circumstances surrounding this transaction and is now then suddenly and precipitously confronted at this trial with these documents without being given an adequate opportunity to investigate, ascertain and evaluate all of the circumstances surrounding this particular transaction. It therefore objects to its reception in evidence. Moreover, the objection is for the further ground that the minutes contain a recital of the letter of the Peoples Bank, which letter itself has also been objected to, and the objection therefore to this document 34 is predicated upon the same ground as the objection made

to the letter itself previously offered in evidence and received in evidence over the Government's objection.

By the Court: Mr. Morse, did you want to make a statement?

[fol. 444] By Mr. Morse: The only statement I want to make is that there was no statement made to Mr. Nickman or Mr. Krysa—and Mr. Logan was present and my son George was present, and they will bear me out—that the minute book contained all the minutes. I merely handed the minute book to Mr. Krysa and said, "You may look through these," and he thumbed through them and asked for photostats of some, which were made in my office and given to him.

By the Court: Very well. It is not necessary for me to dissolve any dispute or misunderstanding between counsel. I think that the objection goes to the weight to be given to the testimony of the documents, rather than to its admissibility. For that reason I will overrule the objection.

The purpose of this trial of the case is to get the truth as nearly as it can be had. And if in truth and fact these are a genuine part of the minutes and relevant, then it would be the duty of the court to receive them, but weighing or testing the weight to be given to them by the court would be determined by taking into consideration all of the circumstances touching their custody and where contained; and if during the progress of this trial of this case it should [fol. 445] develop in good faith that the Government needs additional time to make further examination or further investigation of the minutes, the court would consider in application for such further time. The plaintiff has not yet rested its case, and it is very apparent that the case will continue through the balance of this week, very probably including Saturday. This is Thursday and six minutes to ten o'clock when this objection arose. So with that, I will overrule the objection and let them be marked as exhibits and received in evidence.

(Mr. Morse continues:)

Q. Mr. Frieberger, have you examined your books of account to determine the date and the price paid by Williams Packing & Navigation Company to DeJean Packing Co. for the purchase price of these boats?

A. Yes, Mr. Meyers and I worked together on this yesterday afternoon, and we have the figures on all the transactions.

[fol. 446] Q. Were those figures taken off the books of Williams Packing & Navigation Co.?

A. Taken off the records of the company.

Q. Of the respective companies?

A. That's right.

Q. When was—or when were both of those boats purchased, what day were they purchased, by Williams Packing & Navigation Company?

A. They were purchased on March 4, 1952.

Q. And the consideration for each one of them was how much?

A. The total consideration for the Robert B. Favret was \$15,000.00, and the total consideration for the Jim Eastland was \$12,000.00.

Q. Let me get those papers. We want to offer them in evidence, so give them a copy so they may follow you.

(Witness hands to counsel)

Q. The total purchase price then for the two motor vessels was how much?

A. \$27,000.00.

Q. All right. Now, following the request of the Peoples [fol. 447] Bank of Biloxi that they be liquidated, that the mortgage be liquidated, how was that handled?

A. The boats were sold in order to get—

Q. Sold to whom?

A. Sold to DeJean Packing Company in order to get funds to pay off the loan.

Q. When were they sold?

A. July 23, 1957.

Q. Now, what was the total purchase price paid by DeJean to Williams Packing & Navigation Company?

A. The purchase price on the Robert B. Favret was \$9,962.50, and on the Jim Eastland, \$9,618.16, for a total of \$19,580.66.

Q. Is that evidenced by a check from DeJean?

A. Yes, sir.

Q. Do you have that check there?

A. Yes, sir.

Q. I notice on the face of it is has a notation.

A. Yes, sir.

Q. What is that?

A. "Account charged, \$1.00, non-sufficient funds."

Q. Were those funds made available before the check—
[fol. 448] when the check was cleared?

A. Oh, yes, the check cleared. It has been cancelled, as you notice.

Q. Yes, sir.

OFFER IN EVIDENCE

By Mr. Morse: Now, we desire to offer this in evidence in connection with Mr. Frieberger's testimony and have it marked, with the privilege of substituting a copy and giving the Government a photostatic copy.

By the Court: Very well. Let it be marked.

(Same received in evidence and marked as Plaintiff's Exhibit #35, which exhibit is not copied here because upon order of the Court the original exhibit will be sent up with this record.)

Q. Mr. Frieberger, the amount paid for those boats originally in '52 was \$27,000.00, is that correct?

A. That is correct.

Q. By Williams to DeJean?

A. That is right.

Q. The amount paid by DeJean to Williams shown by the check and your evidence as \$19,580.66.

[fol. 449] A. That is correct.

Q. And that first transaction was approximately 5 years before the second, is that correct?

A. That is correct.

Q. What represents the difference between the \$27,000 that was originally paid and the \$19,980.66 which was paid by DeJean for the purchase of these boats?

A. Depreciation on the Robert B. Favret to July 23, 1957 was \$5,037.50, which when deducted from the cost left a book value of \$9,962.50 sale price.

Q. Were those figures contained in the income tax returns of Williams Packing & Navigation Co. and the DeJean Packing Co.?

A. Well, these depreciation figures are on the tax returns of the Williams Packing & Navigation Co. Of course, the transactions are on the returns of both companies.

Q. I understand.

A. At the time the transactions were made.

Q. Now, the Jim Eastland—the depreciation was how much, did you say?

[fol. 450] A. No, I didn't.

The depreciation on the Jim Eastland was \$4,451.84 total. Now, in addition to the original cost of the Jim Eastland there was an addition for the hydraulic gear amounting to \$2,070.00 which brought the cost up from \$12,000 to \$14,070.00.

Q. And the book—

A. The net book value would be then \$9,618.16.

Q. Were those depreciation figures shown on the income tax returns of Williams Packing & Navigation Company?

A. Yes, sir, they are.

Q. When the Williams got that money—what happened to it, Mr. Frieberger, when Williams Packing & Navigation Co. got this \$19,580.66?

A. The check was deposited in the bank.

Q. Was the mortgage paid off, the one we have introduced in evidence and the note?

A. Yes, sir, it was paid off. But I do not have that check with me.

Q. You have the note, the one we introduced, marked "Paid"?

[fol. 451] A. Oh, yes, it was paid on that note, the \$11,000.00 balance that was due. But I do not have the check to show where it was paid. I could possibly look it up if it's necessary.

Q. But the note was paid off?

A. It was paid.

Q. Secured by the chattel mortgage?

A. That's right.

Q. And what was the balance of the funds used for, the balance of the—

A. —Well, for operating expenses; just deposited in the bank, whatever else was left over and above that was needed

to take care of the note and interest just remained in the bank account and was used.

Q. As operating expense?

A. That's right.

By Mr. Morse: I believe that's all.

Cross-examination.

By Mr. Krysa:

Q. You just testified that you inspected your books and [fol. 452] determined when these boats were purchased and how much was paid for the purchase, is that correct?

A. I say we got the information from the records.

Q. All right. Did you also get the information as to where the money was received that allowed Williams to purchase these two boats from DeJean?

A. What do you mean "where the money was received"?

Q. You paid \$27,000 to DeJean for these two boats.

A. That's right, I did.

Q. Did you check to see where you received the money?

A. No, I just issued the check, and the check was paid. Apparently we had the funds in the bank.

Q. Isn't it a fact that either the day before or the very same day DeJean issued a check to Williams Packing & Navigation Company for the sum of \$30,000.00?

A. That is possible, but DeJean probably owed Williams some money for shrimp.

Q. You stated that at the time of the sale in '57, I believe, from Williams Packing & Navigation Co. to DeJean that Williams negotiated with DeJean for the sale, is that correct?

[fol. 453] A. That was in the minutes there that you have, yes.

Q. Who was present at that meeting where the negotiations were held?

A. All the stockholders and directors.

Q. Could you name them?

A. I was there, Mr. Elmer Williams and Mr. Carroll Williams, Sr.

Q. Could you tell us what happened at these negotiations, how the price was arrived at?

A. It was just offered book value for the boats.

Q. Were you representing both Williams and DeJean at the time in these negotiations?

A. I don't know.

Q. Did you inform any of the other members of DeJean Packing Company that there were insufficient funds in DeJean's bank account to meet the purchase price that was decided on?

A. Mr. Krysa, I don't know from day to day exactly what the bank account is.

Q. Was there any arrangement with the bank that if such a check was written and it became an overdraft it would still be honored?

[fol. 454] A. Our arrangement is as I told you all yesterday, that the check would not be returned for insufficient funds without first notifying me.

Q. That arrangement stands for DeJean also, as well as Williams?

A. Oh, yes.

Q. I believe yesterday that you testified that the original purchase was included in a conditional sales contract.

A. Sir?

Q. You testified yesterday the original purchase also included a purchase price loan; that is, if Williams had insufficient funds to pay the full price, the \$27,000—?

A. Well, I was going from memory then, but since looking up the record I found that that wasn't so.

Q. Then you are changing your testimony now?

A. Yes, I was going from memory there. The full price was paid. What I mean to say is I didn't remember the date of the mortgage and I didn't remember the date of the loan. I knew that there was a mortgage and a loan at the bank secured by a mortgage, but I didn't know if that was [fol. 445] at the same time that the boats were purchased. I went and looked at the record yesterday after I left court and found this is the correct information.

Q. What kind of mortgage was this?

A. The mortgage that you have there is a chattel mortgage and it is recorded in Gulfport at the chancery clerk's

office, but I'm fairly certain that there was also a mortgage recorded in the Custom's office upstairs and of course that was—

Q. What were these funds used for? To repair the boats?

A. Which funds?

Q. The loan.

A. Well, Williams just needed some money. They were short of funds and they had some property they could borrow on so they borrowed on it.

Q. This money was borrowed in April?

A. Yes, April, 1956.

Q. Hadn't Williams been selling shrimp and oysters to DeJean prior to that time?

A. It's possible that DeJean was sort of short of funds themselves.

Q. And we haven't arrived at the time of the year where [fol. 456] Williams makes the adjusting entries; therefore, the accounts receivable at this time from DeJean should have been sufficient to provide Williams with any money that it needed for the operations. Isn't that correct?

A. I'm sorry, I didn't follow you. You are putting too much into the questions. Simplify it for me.

Q. When did you receive the letter from the bank?

A. Whatever the date on it is, the next day it was mailed.

Q. What was that date?

By Mr. Morse: That was April 19, 1957.

Q. Was that after the investigation?

A. I don't know.

Q. —For this current assessment?

A. I don't know.

Q. Wasn't this investigation in March of '56?

A. I can't recall all those dates.

By Mr. Morse: Whatever date Mr. Price says, we agree that is it.

By Mr. Nickman: We would like the record to show in view of counsel's agreement that the recording of this [fol. 457] mortgage was after the Government had already commenced its tax investigation.

By the Court: Is that agreed to by Mr. Morse?

By Mr. Morse: We don't know that they commenced it—

By the Court: I understand Mr. Morse to say he would agree to whatever Mr. Price stated the investigation was commenced, he would accept it.

By Mr. Morse: We knew when Mr. Price came in he stated what his purpose was, and that is when we knew about it.

By the Court: Is Mr. Price present in court?

By Mr. Nickman: He will testify as to the exact date.

By Mr. Morse: Well, that is all right.

By the Court: Very well.

By Mr. Morse: No further questions.

By the Court: (to witness) Stand aside.

(Witness excused)

By Mr. Morse: We have just one witness remaining. Shall we call him now?

By the Court: Yes, sir.

[fol. 458] WALTER L. McVEAY, called as a witness and having been duly sworn, testified as follows:

Direct examination.

By Mr. Morse:

Q. Your name is what?

A. Walter L. McVeay.

Q. Where do you live?

A. Gautier, Mississippi.

Q. You are better known in Biloxi as Son McVeay, are you not?

A. Yes, sir, that's right.

Q. Probably your sunny disposition?

A. Yes, sir.

Q. I know you better as Walter, and I'm going to call you that. Walter, what has been your occupation all your life?

A. Fishing.

Q. Where have you engaged in that business?

A. I work out of Biloxi. I was born and raised in Biloxi and I worked right out of here since 1925.

Q. But your home is in Gautier?

A. About 14 years I moved over there, that's right.

[fol. 459] Q. During your career as a fisherman, have you worked on a boat that was furnished you by Mr. Elmer Williams?

A. Yes, sir.

Q. Were you sworn in Monday?

A. Yes, sir.

Q. What boat was that?

A. Eustis McManus.

Q. And how long did you work on that boat?

A. I worked on that from September through the shrimp season—not through the shrimp season, but up until December and the early part of the year, and I had a small boat and I wasn't what you call a good shrimper. I was just a normal shrimper. My biggest part of the boating was done in the oyster industry. And I just told Mr. Williams I'd like to get a job. I was going to take the boat and go run raw oysters. So he said it was perfectly all right with him, so I took the boat.—And first I went to Mr. Koenann and asked him—

Q. Who is Mr. Koenann?

A. That's a raw oyster dealer on the Back Bay. And I [fol. 460] asked about a place making a few trips during Christmas that I could use a little surplus.

Q. What year was that?

A. If I'm not mistaken it will be four years ago this coming September. I think it was about right.

Q. That would be about September of '55?

A. I imagine that would be about right.

Q. '54 or '55?

A. Yes, sir.

Q. Somewhere around there. When you brought the oysters in you sold them to Mr. Koenann?

A. Yes, sir.

Q. Does Koenann have any connection with the Williams Packing & Navigation Co.?

A. No, sir.

Q. When you obtained this boat from Mr. Williams, how did you get it, Walter?

A. Well, I don't remember where I seen Mr. Williams at, but I just asked him did he have a boat vacant and he said, "I don't know, Son." He said, "I'll check on it. Come back and see me," which I did. And maybe 3 or 4 or 5 [fol. 461] days I did come back and he told me he had one vacant and he said I could have the boat.

Q. Now, who fixed up the rig on the boat, saw to it that the rig was like you wanted it?

A. The boat was practically rigged, but as a boat is changed from one captain into another there is always some addition he wants to put on hisself for his own benefit. That's what I did.

Q. Who selected the crew?

A. I did myself.

Q. Did Mr. Williams tell you when to go out fishing, what to fish for or where to go?

A. No, sir. I tell you, nobody can run a boat and set in a office and tell a man where to go. He goes where he pleases. If he don't he couldn't make a living, and nobody else could.

Q. Did he ever give you directions or tell you who to hire as a boat crewman?

A. Well—

Q. If he had, what would you have done, Walter?

A. Well, you want me to tell you plain what I would have told him?

Q. Yes.

[fol. 462] A. I would have just told him to go to hell with the boat, to run it hisself. That's what I would have told him.

Q. Is that the way all the boat captains would have done?

A. Yes, absolutely. They would just tell them to go ahead and take the boat.

Q. They wouldn't follow any instructions?

A. I know they wouldn't.

Q. You were a member of the old Gulf Coast Shrimpers and Oysterman's Assn.?

A. Yes, sir.

Q. You were a defendant in that case?

A. Yes, sir.

Q. And you were convicted?

A. That's right.

Q. Along with some other members of the union?

A. Yes, sir.

Q. And I believe the sentence on you was suspended?

A. Yes, sir, that's right.

Q. By Judge Mize?

A. Yes, sir.

Q. Now, Walter, you—what position did you hold in the Gulf Cost Shrimpers and Oystermens Association?

[fol. 463] A. I was secretary of the Association of Jackson County from 1947 up until the Government said that we were operating wrong, and I didn't seek reelection, which I was in there either 6 or 7 years as secretary in Jackson County.

Q. Now, Walter, they had two trials there, didn't they?

A. Yes, sir, that's right.

Q. There was a mistrial in the first case?

A. Yes, sir.

Q. In other words, the jury couldn't agree?

A. That's right.

Q. In the second case the jury agreed and you all were sentenced by the court?

A. Yes, sir, that's right.

Q. And then an appeal was taken to the United States Court in New Orleans?

A. Yes, sir.

Q. Where it was affirmed, and then attempted to take it to the Supreme Court of the United States, where they would not grant an appeal.

A. Wouldn't grant it—that's right.

Q. Then it came on back and you were sentenced?

[fol. 464] A. That's right.

Q. Now, about when, if you know, Walter, did the fishermen stop fixing prices? Was it at the time of the indictment? Was it at the time of the first trial? Was it at the time of the second trial, or was it at the time when the Supreme Court finally would not review it? If you know.

By Mr. Nickman: We object. There is no evidence in this case so far that there has been any actual fixing of prices. I think we should have a statement on whether he is speaking of establishing the price or fixing it.

Q. When you were in the union you had what was known as a price fixing committee?

A. That's right.

By the Court: I don't believe we will try that case over. I think you have shown sufficient evidence that there was an indictment and a trial and conviction and it was affirmed. So I don't think we will take up any more time going into it.

By Mr. Morse: All right, Your Honor. There's just one [fol. 465] further question I want to ask.

Q. Now, Walter, since the union ceased existing—The union is not in existence any more?

A. No, sir.

Q. All right. Prior to that time the union did fix prices?

A. Well—

By the Court: Gentlemen, I'm not going into that. The record speaks for itself. What are you trying to show?

By Mr. Morse: Your Honor, I was trying to show—I think probably—I know you are right.

By the Court: All right. The case was affirmed and sentence was imposed upon the defendants who were adjudged guilty in that case. If you want the exact date of it—

By Mr. Morse: No, sir, I don't want it, and I'll get away from that.

By the Court: If you are trying to show you can fix it with reference to the date the sentence was imposed or the date the jury came in or the date—

By Mr. Morse: —Let me ask this one question then.

By the Court: All right.

[fol. 466] Q. Do you know about when the union stopped fixing prices?

A. Well, as near as I can remember, I think when the Government decided on the case. That was in the first trial. I think they just completely stopped faking any activity in any business that I know of.

Q. Now, Walter, you worked after that time as a boat captain, didn't you?

A. Yes, sir.

Q. And you worked on a boat that was furnished you by Mr. Elmer Williams?

A. I did, and also for Castiiglia Shrimp Company and worked for individual captains as crew.

Q. Now, has there been any changed in the selection of boat captains, crewmen and the method of their operating since the strike, than there was before the strike except for price fixing?—I meant the conviction.

A. No, it hasn't changed in the operation since I first went on a boat when I was only about 17 years old.

Q. There has been one change, has there?

[fol. 467] A. No, sir.

Q. I don't mean in the method of operation. I meant in the price. There has been one?

A. Oh, no, no, sir.

Q. The price now is not fixed?

A. No, sir.

Q. It is according to the law of supply and demand, is it?

A. That's right. That's right.

Q. Walter, during the time that you were operating as captain of the boat, did you ever pay social security?

A. No, sir.

Q. Self-employment?

A. No, sir.

Q. Was any income tax withheld on you?

A. No, sir.

Q. Was any social security withheld on you by Williams Packing & Navigation Company?

A. No, nobody, not as long as I ever been on a boat in my life.

By Mr. Morse: That's all.

By the Court: Take 15 minutes recess at this time.

(Whereupon Court recessed 15 minutes.)

[fol. 468]

After Recess

Cross-examination of McVeay.

By Mr. Krysa:

Q. Mr. McVeay, I don't think I quite understood as to what period of time you were working on a boat owned by Williams Packing & Navigation Co. or DeJean. Will you again tell us when that was?

A. I said I think to the best of my knowledge it was either September, either 3 or 4 years ago, when I took the boat.

Q. Would it be '55 or '56?

A. I told you as much as I could remember. It would be September or—either 3 or 4 years ago.

Q. Is that the only time that you have worked on a boat owned by Williams or DeJean?

A. Well, I couldn't answer that question. I worked with DeJean Packing Co.—I mean Williams Packing Company, whichever it may be, but under another captain, and it run for them, yes, but who owned the boat, I don't know.

Q. Were those independent boats?

A. I don't know.

[fol. 469] Q. Do you remember the names of them?

A. Yes, sir.

Q. What were those names?

A. Was the Catherine Williams one of them?—Pete Hilatte was the captain. And the other was the Mary Margaret and run by Ernest Ross. That was during the war.

Q. Do you know whether these were company owned boats or not?

A. No, sir.

Q. You don't know.

A. No, sir.

Q. You stated that Mr. Williams or anybody connected with Williams Packing & Navigation never tells you when to go fishing or where to go or when to come in. Isn't it a fact you were hired because you know where to go fishing?

A. You say I was hired because I knew where to go?

Q. Isn't it a fact you were hired because you know where to go fishing, had experience in fishing, were expected to know?

A. I think I had enough knowledge to know where to go at.

[fol. 470] Q. And they allowed you to hire your own crew because they know you want to work with people that get along with you and you will work with them? Isn't that correct?

A. That's exactly right.

Q. You stated the boat you recently worked on for Williams was the Eustis McManus?

A. Yes, sir.

Q. And you were shrimping or oystering?

A. I was shrimping through the balance of September, October and November. Shrimping was bad and I went to raw oystering with the boat.

Q. How long were you on the raw oyster business?

A. Sir?

Q. How long were you doing raw oysters?

A. I don't quite understand.

By the Court: How long were you operating for raw oysters?

A. I worked raw oysters through December, and I don't recollect if I made a trip after the first of the year, but [fol. 471] during the raw oyster season the biggest demand is right around Christmas time and that's when the other factory could use other boats for the demand of the stuff around Christmas.

Q. Could you recall how many trips you made for raw oysters in that December?

A. Yes, sir, either three or four, and then the man told me he didn't need me any more because he had enough boats that was in there before I asked him for a place.

Q. Were you captain of that boat at that time?

A. Yes, sir.

Q. Do you recall which captain had the Eustis McManus before you received it?

A. I think it was a man by the name of Smith, but his first name I don't know.

Q. Did he continue to work for the company after you took over the Eustis McManus?

A. I don't know. They change boats day in and day out. One man will quit a boat and the next man ask for the other boat that has been quit because it's a better boat or got more horse power or desires to change or something. And I don't know if he worked for the company or not.

[fol. 472] Q. This boat, the Eustis McManus,—did you have any arrangement with Williams Packing & Navigation Company about purchasing this boat?

A. I did.

Q. What was the arrangement?

A. The arrangements I had with them to buy the boat by shares and that was the only arrangement I had with them.

Q. While you were working on this boat that was your understanding? You were purchasing this boat? Is that correct?

A. Well, I had made an arrangement to take it over, that's right.

Q. I believe you said you have never paid self-employment tax, is that right?

A. Did which?

Q. You stated that you have never paid Self-employment tax?

A. I have not.

Q. And I believe you also stated that Williams Packing at least has never withheld social security from your pay? [fol. 473] A. Not when I was on boats.

Q. Wouldn't you say that somebody owes the Government some money here?

A. Sir?

Q. Wouldn't you say that somebody owes the Government here? You were either self-employed or an employee.

A. I'm no judge of that business myself.

Q. Well, when you were working with Williams Packing Company did you consider you were on a joint venture?

A. Well—

By Mr. Morse: We object to what he considered himself as. The facts will speak for themselves.

By the Court: Yes, sustain the objection.

Q. Did you at any time while you were working for Williams Packing & Navigation Company file a partnership information return with the Internal Revenue Service?

A. No, sir. I filled out my own income tax return during the year that I had that *boat myself*.

[fol. 474] Q. You filled out an individual return?

A. That's right.

Q. But not a partnership return?

A. No, sir, I did not.

Q. You said you were shrimping for three months for Williams?

A. Yes, sir.

Q. During that time were you ever put on an *ice* limit?

A. No, sir.

Q. With Williams Packing?

A. No, sir. They never told me nothing about the boat or about how to operate or where to buy or who to buy or nothing. I just fell in line with the rest of the boats working around there.

Q. Were you ever requested by Elmer Williams or the Williams Packing Company to try to get certain size or quality of shrimp?

A. No, sir, I think the company was too glad to get any kind they could get, like the rest of the packers.

Q. At this time you still were buying on shares the boat?

A. You say when I was on the boat? Yes, sir, I imagine would answer the question.

[fol. 475] Q. Would you tell us where you are working now? Are you still a boat captain?

A. No, sir.

Q. Where are you working now?

A. I'm working for Williams Packing & Navigation Company.

Q. Williams Packing?

A. That's right.

Q. In what capacity?

A. I work around on the boats, getting them rigged up, work around the shipyard helping to paint or do most anything to rig a boat up and see that the men get out and make another trip.

Q. Did you get paid by the Williams Packing & Navigation Company?

A. I get paid by the hour. I punch a clock every morning and punch it out in the evening.

Q. Have you ever held any other capacity, either for Williams or DeJean other than the job you have now or as a boat captain or a crewman?

A. Well, I wouldn't know exactly how to answer it. I mean, with the question you're asking me.

Q. Were you affiliated with them in any other way at any time other—?

[fol. 476] A. Yes.

Q. When was this?

A. That was two years—That was last year and year before last.

Q. What were you doing?

A. I was buying shrimp.

Q. Where?

A. Pascagoula.

Q. Then you were a resident buyer in Pascagoula purchasing shrimp for delivery to DeJean?

A. I didn't have to deliver them there. I could sell them—if I didn't figure I had enough to run them over there I could sell them to other people.

By Mr. Krysa: Nothing else.

By Mr. Morse: Just two questions.

Redirect examination.

By Mr. Morse:

Q. Was that agreement to purchase the Eustis McManus in writing or was it an understanding you had with Mr. Williams?

A. Well, I talked to Mr. Williams about it and it was in [fols. 477-480] writing, but I don't know if it took effect after I took the boat or about the time I took the boat. I wouldn't know exactly. I couldn't answer a direct question about that.

Q. Did you ever get title to the boat or stop the arrangement?

A. Oh, no, no, sir.

By Mr. Morse: That is all.

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[fol. 481]

STIPULATION OF COUNSEL

By Mr. Morse: Now, about your post office box, we will agree that the Williams Packing & Navigation Company, [fols. 482-487] Inc., of itself does not have a post office box in its name, but that its stationery does show the same post office box as DeJean Packing Company, which is Post Office Box 932, Biloxi, Mississippi.

By Mr. Nickman: That is, the two companies have the same post office box, but the post office box 932 is the registered post office box of the DeJean Packing Company?

By Mr. Morse: That is correct.

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[fol. 488] O. H. Longcoy, having been duly sworn, was called as a witness:

Direct examination.

By Mr. Krysa:

Q. Will you state your name, please.

By Mr. Morse: In order to shorten this, we will agree that Mr. Longcoy will state there is no telephone listed in the [fol. 489] name of Williams Packing & Navigation Company in the books at Biloxi, Mississippi, if that such stipulation is agreeable.

By Mr. Nickman: Will you also agree there is no phone for that company either listed or unlisted?

By Mr. Morse: We agree to that, that they use the same phone as DeJean.

By Mr. Nickman: That DeJean is the subscriber and pays for it?

By Mr. Morse: We will admit that. That's right.

By the Court: You may step aside, Mr. Longcoy.

(Witness excused.)

GLEN SWETMAN, called as a witness and having been duly sworn, testified as follows:

Direct examination.

By Mr. Nickman:

Q. What is your full name?

A. Glenn L. Swetman.

Q. What is your occupation.

A. Vice President and cashier of the Peoples Bank of Biloxi.

Q. How long have you held that position?

[fol. 490] A. Something over 20 years.

Q. Will you tell us something briefly of the nature of your duties in connection with that position?

A. Well, it's practically the same as an executive vice-president of any bank of our size. In other words, you might say I have practically charge of the operation of the bank, and of course I have an assistant, minor officers, and also I have to comply with the regulations of the banking department as to the functions of the loan committee and under the authority of the board of directors.

Q. Now, does your function also include passing upon commercial loans at that bank?

A. Yes, sir.

Q. With specific reference to the matter at hand, has your bank, the Peoples Bank of Biloxi, from time to time made loans to the Williams Packing & Navigation Co.?

A. Yes, sir.

Q. You may consult your records, if you will. Do your records indicate whether or not the Peoples Bank of Biloxi made a loan to the Williams Packing & Navigation Company on April 19, 1946?

A. Yes, sir.

By Mr. Morse: '36, isn't it?

Q. 1956.

A. 1956.

Q. What do your records show as to the amount of that loan, the original amount?

A. \$12,500.00.

Q. Now, do your records indicate whether any security was posted with reference to that loan?

A. Yes, sir. It was secured by chattel and marine mortgage on certain vessels.

Q. When was the mortgage, according to your records, executed?

A. The same date of the note, April 19, 1956.

Q. Would you please tell the circumstances surrounding that loan? That is to say, did you have any discussions with the borrowers of that money?

A. Yes. I don't recall the exact conversation, but they must come in and apply for a loan, and naturally we ask them how the loan is to be secured, and they tell us the security and then, after the loan is approved, we go ahead [fol. 492] and prepare the papers.

Q. Was Mr. Elmer Williams and was Mr. Frieberger present during those conversations relative to this money?

A. I don't recall, but either one or both must have been present, because we wouldn't have—

Q. Now, was there any discussion by them or by you as to the existence of a Federal tax claim or lien by the United States Government?

A. No, sir, we didn't know of any lien.

Q. If you had been advised that the Government had an outstanding tax claim, would you have made this loan?

A. No, sir, the chances are we wouldn't.

By Mr. Morse: May we agree that there was no lien until August of 1956 placed of record? I think it was August—what date?

By Mr. Krysa: We are going to submit a certified copy.

By Mr. Morse:—August 21, 1956.

By Mr. Nickman: My question was not whether there was a lien, but a claim.

[fol. 493] By Mr. Morse: Oh, a claim.

Q. In other words, then, Mr. Swetman, no statement or revelation or disclosure had been made to you either by Mr. Williams or by Mr. Frieberger or by any representative of this borrower that there was an outstanding claim by the United States for unpaid taxes?

A. No, sir.

Q. Now, at the time this money was initially advanced by your bank, did you reach or arrive at, or were you aware of some value of this security, these boats?

A. Yes, sir.

Q. Now, the mortgage was on what property, according to your records?

A. According to our records. In other words, may I state that the note was made in April, 1956, and was paid off about a year later, paid off July 23, 1957, so we haven't any records other than our ledger sheet, which is not complete as to the exact boats this mortgage covered.

[fol. 494] Q. Mr. Swetman, I hand you a document entitled "Chattel Deed of Trust," being Plaintiff's Exhibit No. 28. I ask you to inspect this document and I ask you whether or not you have seen it before and are familiar with its contents?

A. Yes, sir, I am familiar with it.

Q. Does that document indicate to you the nature of the collateral security which was posted to support this advance by the bank?

A. Yes, sir.

Q. Did you determine at that time the value of that collateral security?

A. Yes, sir.

Q. What was the value of that security? The gross value.

A. These two boats would have a value in the neighborhood of \$50,000.00.

Q. Your bank had a claim of \$12,500.00. What then was the equity in those two boats at that time?

A. About \$37,500.00.

By Mr. Nickman: Your Honor, Counsel have stipulated that—

Q. Is this the ledger sheet?

[fols. 495-496] A. Yes, sir, that is a copy of our loan ledger sheet.

OFFER IN EVIDENCE

By Mr. Nickman: —Counsel have agreed that there may be received in evidence the ledger loan sheet of the bank of the Williams Packing & Navigation Company, this being a certified copy of the original in the records of the bank.

By the Court: Let it be marked.

(Same received in evidence and marked as Defendant's Exhibit #7, which exhibit is not copied here because upon order of the Court the original exhibit will be sent up with this record.)

[fol. 497-513] RAMSEY GIROUARD, called as a witness and having been duly sworn, testified as follows:

Direct-examination.

By Mr. Nickman:

Q. What is your full name?

A. Ramsey Girouard. Girouard.

[fol. 514] Q. Were there times while you were working there when the company didn't want *toomuch* shrimp at the dock?

A. Yes.

A. Yes.

Q. Would they let you know about it?

A. Well, if the production was more than they could handle at the dock at times, would call us by radio and tell us not to come in that particular day or if they thought supply was too low the next day and maybe too much the following day, asked us to come in where they could fit in the supplies.

[fol. 515] There has been some discussion at this trial about so-called outside sales—they call them sales—or outside deliveries. Do you ever have anything like that? Do you have anything like that at Golden Meadow?

A. Yes.

Q. Suppose you tell us about that little incident. When was that approximately?

A. Could be '54 or '55.

Q. If I said it was May '54, would that refresh your recollection?

A. I think he stated the checks were that date on that, in his testimony. —At that time, regardless of when it was.

Q. May '54. Suppose you tell us about it, Mr. Girouard. What happened first? Were the boats shrimping at that time?

A. At that time the boats were stopped.

Q. The boats were stopped. And did you want to go shrimping?

A. Yes.

Q. What happened. Did you talk to Mr. Williams?

[fol. 516] A. Yes, sir, I spoke, myself and the captain on the Ronald, Jr., and the captain on the Alma May spoke to Mr. Williams. Whether it was in his office or outside—but I think it was in his office, and we asked permission to go work for somebody else where we could sell the goods elsewhere.

Q. What did he say that time?

A. At that time he said "No."

Q. What happened next?

A. The following day we went back down. We met him somewheres along the line, and he said, "If you all want to go you all can go."

Q. Did you go?

A. Yes, we did.

Q. On what boat was that?

A. That was on the Reub Junge.

Q. You were on the Reub Junge? You were captain of that boat?

A. Yes.

Q. Did you go shrimping off Golden Meadow?

A. Yes, that was where we made our trip.

Q. Were there any other boats in that group with you from the company?

[fol. 517] A. Yes. The Alma May and the Ronald, Jr., was the three together.

Q. Who was the captain of each of those boats?

A. Captain of Ronald, Jr., Sagasta Langlinais; captain of the Alma May was Francis Girouard.

Q. Tell us how you delivered that catch in that area. What happened?

A. Well, we went to Golden Meadow and shopped around for the best price and sold them for the best price.

Q. You got a check when you delivered that catch, is that right?

A. I did.

Q. You brought the check back to the company?

A. I did.

Q. When you got back to the company did you have a conversation with Leon Hall?

A. I did.

Q. What did he tell you?

A. He said, "We tried to get in touch with you all by radio but we was unable to get in touch with you all, wanted you all to bring the shrimp in."

[fol. 518] Q. Now, did the company have a limit on the amount of ice you could take on a trip.

A. Yes, they did.

Q. If the company didn't want you to go out and you called the ice company, what happened?

A. Well, if the company didn't want you to go out, usually you couldn't get no ice at the ice company and the ice company wouldn't give you no ice.

Q. You mean you would call the ice company and they'd tell you you couldn't have it?

A. Yes, either notified by the company they didn't want no shrimp and didn't want us to go out or they'd call the ice company and we couldn't get no ice.

Q. Did you get your oil at the dock right here at Biloxi?

A. Yes.

Q. You got your oil for the trawler at the DeJean Packing Co.?

A. Right, yes.

Q. When you were at the docks, could you buy your oil any place else except at the docks, when you were right here at Biloxi, at the time when they had the pumps?

[fols. 519-524] A. I don't know. I don't think we could have, because they had their own docks.

Q. Did you ever get it any other place?

A. No.

Q. How did the prices of the oil at the docks compare with prices at other places?

A. Well, at that time they was a cent, sometimes a half cent difference on diesel oil, and at times there was as much as twenty-five cents a gallon on the lub. difference.

Q. You mean DeJean was giving it to you cheaper than the other places?

A. No, we paid more.

Q. Oh, you paid more at the DeJean Company. Now, from the time the Hall Grocery Store opened up, did you always buy your groceries at that store?

A. Yes, if we was in Biloxi.

Q. If you were in Biloxi?

A. Yes.

Q. The only time you bought your groceries *anyplace* else was when that was due to an emergency?

A. Yes.

.

[fol. 525] Q. Was there some reason why you became captain of this new boat with reference to your production?

A. I imagine my production must have had something to do with it.

Q. Now, can you deliver the catch of shrimp any place you want or do you bring it back to the docks? Do you have to bring it back to the docks?

A. I have to bring them back to the docks.

Q. Except where there is some unusual circumstances?

A. Yes.

Q. Now, have you had occasions where you were out shrimping and you got caught in bad weather? Did you understand the question? You were out shrimping and you ran into bad weather while you were out shrimping in the Gulf.

A. Yes, we have that occasionally, plenty of times.

Q. Did you have a transaction in February of 1955 with [fol. 526] the Buras Fisheries in Louisiana when you ran into bad weather? Do you remember that?

A. What year?

Q. I'll have you take a look at this, which will refresh your recollection, being a bill from Buras Fisheries. Do you remember that incident?

A. Yes.

Q. What were the circumstances under which you made the delivery to Buras Fisheries in Louisiana? What happened?

A. At that particular time we had got caught in bad weather and—

Q. Did you have much of a catch?

A. No, sir. According to this, we had—Looks like not quite four barrels of shrimp here.

Q. What would be an average catch of shrimp in normal times? What would be the average when the shrimp are running pretty good? What would be the average catch?

A. You mean on a trip or day?

Q. Yes, on a trip.

A. At that time I imagine about fifteen or maybe twenty barrels.

[fol. 527] Q. This would be rather a small catch, is that right?

A. Yes.

Q. What did you do with that catch at that time?

A. Well, if I remember correctly. It was myself, the Ronald Jr., and the Alma May together, and we was at the mouth of the river, and this bad weather come up and we couldn't work, and we went up the river to Venice.

Q. Yes, what happened?

A. And then from there we called up the company?

Q. You called the company?

A. Asking permission to—By the way, this was the first time I'd ever unloaded any shrimp other than to the company or when we actually was freight boats from one boat to the other, when actually freight. This if the first time I'd ever sold any shrimp to outside, directly to outside dealers other than on freight boats. It was either I or Mr. Langlinais called the company asking permission to sell these.

Q. Did you get permission?

A. Yes.

[fols. 528-531] Q. And after you got permission you sold them?

A. We did.

.

[fol. 532] Cross-examination.

By Mr. Morse:

Q. You started working down there on a boat in 1943, is that correct, Captain?

A. Somewheres along that time.

Q. And you have been working continually as a boat captain either on one boat or another from then up until [fol. 533] when?

A. Middle of '58.

Q. That would be along May 1, '58?

A. Somewheres around there.

Q. Was that when the strike started down there?

A. It was a little after the strike started.

Q. You were a member of the local union, Fishermen and Allied Workers Union, affiliated with MMU, AFL, CIO, were you not?

A. Yes.

Q. And as captain of the boat, when the picket line was formed you went out on the strike against them, did you not?

A. That was in '58, yes, sir.

Q. '58. That's what I am talking about.

By Mr. Nickman: I think we are going to object on the same ground he objected, that we are interested in only—

By the Court:—K I think this is admissible as going to the weight.

[fol. 534] By Mr. Nickman: If that is what it is being used for.

By the Court: That is the only purpose for which it is admissible.

Q. And you were invited to come down and have an evaluation made of the rig and to settle up with the company after you refused to take the boat out, weren't you?

A. I refused to go out during the strike, yes, sir.

Q. I show you a copy of a letter signed by Mr. Lu Frieberger and mailed to you, showing various items that make up the rig.

A. I remember that one, but it's an incorrect one.

Q. Well, you went down to see Mr. Frieberger or he met you somewhere, did you not?

A. No, we talked over the phone on this particular deal.

Q. Yes. Now, the price that was paid was, the balance due, the equity in the rig, according to Mr. Frieberger was \$1,667.11, was it not?

A. I wouldn't know. I'm not familiar with stuff like that. I could tell you what I settled for.

Q. All right.

[fol. 535] A. If you ask me the question.

Q. How much did you settle for?

A. \$320.00, or about that much.

Q. How much did your two crew members get?

A. They each got the same amount.

Q. So that three hundred and some-odd dollars—Was it three hundred or five hundred that you got?

A. Three hundred.

Q. But you did accept that in settlement?

A. You asked me on the rig?

Q. I'm asking you on the rig and everything. On everything—

A. You're changing your question.

Q. I'm changing my question.

A. You asked me on the rig.

Q. No, I'm asking you how much did you get all together on the equipment

A. On the equipment we got \$320.00.

Q. On the rig and equipment, the automatic pilot, depth recorder, radio receiver, butane cylinder, the trawl,—

A. Correct.

Q. —Trawl boards,—

[fol. 536] A. Correct.

Q. —The cotton trawls, wire cable, blocks,—

A. Correct.

Q. —The swivels,—

A. Everything Itemized on that.

Q. Everything itemized. What was the other money you got? What did that represent?

A. Some oil we had left on the boat.

Q. And how much did you receive all together?

A. The oil and the rigging amounted to \$370.00.

Q. \$370.00?

A. Somewheres about that.

Q. Some time after you went on strike, you filed a suit against the Williams Packing & Navigation Company, Elmer Williams, Cornelia Williams, Ophelia Williams, doing business as DeJean Packing Company, didn't you?

A. Yes, sir.

Q. And that suit is now pending in this Court, United States District Court, at this time?

A. Yes, sir.

Q. In which you have sued them for \$75,000.00.

[fol. 537] A. That is correct.

Q. Wait a minute—\$175,000.00 altogether. Did you know you had sued them for that much?

A. I know the figures pretty close, but I think you kind of confused me when you read it out.

Q. I'm talking about the full amount shown on the last page, \$175,000.00.

A. \$175,000.00. That's correct.

Q. One of the attorneys was my nephews, Josh Morse of Poplarville. Is that right?

A. Yes, sir.

Q. Now, when the Reub Junge was turned over to you, that was in 1954, wasn't it?

A. I'm pretty sure it is.

Q. All right. When it was turned over to you, what was said to you by Elmer Williams or anyone else?

A. When it was turned over?

Q. Yes, when you became captain.

A. Nothing wasn't told to me.

Q. Did Elmer Williams tell you what crewmen to select?

A. No, sir.

Q. Did he tell you when to go out fishing?

[fol. 538] A. No.

Q. Did he tell you when to come back?

A. No,—at times they did, yes, sir.

Q. Did he tell you where to fish?

A. No, sir.

Q. Did he ever tell you to fish at nighttime?

A. No, sir.

Q. Or daytime?

A. No, sir.

Q. Did he ever tell you to fish day and night?

A. No, sir.

Q. Did anyone else connected with him?

A. No.

Q. Now, the determination of when you do those things was left up to what person?

A. To myself.

Q. And you have been a good fisherman? I mean, you've made good catches out there, haven't you?

A. That's what the record shows.

Q. I know that to be true. And so, it wasn't necessary for anybody to give you any orders about where to go fishing when to fish or when to come in, was it?

[fol. 539] No, sir.

Q. Now, before they got the picking machines down there, if you would bring in real small shrimp, particularly when they had a large number of shrimp, the pickers wouldn't pick the small shrimp, would they, Captain?

A. How's that question again?

(The last question was read by the reporter.)

A. They'd pick some of them, but probably they couldn't pick them all, yes.

Q. Couldn't pick them all. Now, the things that you did and testified about doing on the Reub Junge, you did the same things on the Alma May and the Anna Williams, didn't you, about going out and coming in and fishing where you wanted to?

A. With the exception of one thing. On the Reub Junge I've sold them shrimp and on the Anna Williams I never sold to outside dealers.

Q. I meant going where you wanted to go,——

A. Yes.

Q. —fishing when you wanted to fish,——

A. Yes, sir.

[fol. 540] Q. —coming in when you wanted to come in.

A. Yes, sir.

Q. Now, you knew where the office of the Williams Packing & Navigation Company was, didn't you, Captain?

A. Yes, it was—I didn't even—I knowed—just knew the office was there. That's where we got our check from.

Q. You knew Lu Frieberger was connected with that because he would give you a check for the Reub?

A. I didn't always get the check from Frieberger.

Q. I mean, you would get your check,—in—from his office?

A. Yes.

Q. In the office?

Q. Yes.

Q. The other captains of the boats down there, they knew, the ones that did business with Williams Packing & Navigation Company, where the office was, didn't they? They didn't have to put a sign up?

A. I imagine they did.

Q. Now, you were talking about being deferred in 1944 and having about three deferments, Captain. Did you [fol. 541] know that I actually handled those deferments for you, most of them?

A. I don't know who handled them.

Q. You were engaged in then what was known as an essential business, or producing food for the United States and the Armed Forces, weren't you? In other words, catching shrimp.

A. I got a deferment, Mr. Morse. I don't know under what conditions, because I never did see the conditions.

Q. You were engaged in the business of producing food in the form of shrimp for consumption, not only by the United States Armed Forces, but by the people of the United States, were you not?

A. Well, I imagine anytime we catch a barrel of shrimp, everybody buys it. I—

Q. That's what I mean. Say, shrimp were being brought in and sold to the public.

A. I imagine Mr. Williams sold them, yes.

Q. And about how or why you were deferred, you have no knowledge of that?

A. I imagine I got deferred because I was a good fisherman.

[fol. 542] Q. And you were catching shrimp to be used as food?

A. I imagine so.

Q. When you were on the Reub Junge, do you remember when you made a big catch of red snappers?

A. Yes, I do.

Q. About how many red snappers did you catch in your trawl, Captain? That was one of the biggest catches that has ever been made, wasn't it?

A. Oh, no, sir.

Q. I mean, catching them in a trawl.

A. We had about 400 pounds.

Q. 400 pounds. And did you sell those?

A. We sold some and gave the majority away. We gave some to Mr. Frieberger and Mr. Williams. We gave everybody that wanted some around the plant. I'm not positive who I gave them to, but everybody around the plant that wanted.

Q. The place where you sold the red snappers—The red snappers you sold, you and the crew members shared that up, didn't you?

A. The ones we sold we did.

Q. And neither the boat or rig or boat owner got any share of those?

[fol. 543] A. No, sir.

Q. And that applies to all edible fish that you all catch on any of these trips, doesn't it?

A. Yes.

Q. And at times you catch—Well, you caught \$400.00. Have you ever caught that—

A. Not \$400.00.

Q. I mean, worth—How much money did you get out of that?

A. We sold—\$70.00.

Q. Well, whatever it was—

A. Between fifty a hundred dollars.

Q. Yes.

A. I say, between fifty and a hundred dollars.

Q. And you have done that before with edible fish that you did catch? Flounders and other fish you would catch, wouldn't you?

A. At times.

Q. And the crew members and you would get the money for the sale of those fish?

A. Right.

[fol. 544] Q. And there was no share that went to the boat or the rig at all?

A. No, sir.

Q. Although the rig and the boat were used to catch those fish.

A. That is correct.

By Mr. Morse: I believe that is all.

By the Court: Any redirect?

By Mr. Morse: Excuse me. I believe there was one other question on this.

Q. When you got to the Reub Junge, who rigged it up?

A. How you mean? The fishing equipment?

Q. Yes, the gear and the trawl and all.

A. We did.

Q. You did. And when you say "we did," whom to you mean?

A. Me and my two crew members.

Q. Did you fix up the rig like you wanted it to be?

A. That's correct.

Q. And you put the blocks in the places you wanted them to be, is that right?

A. That's right.

[fol. 545] Q. And you put the winches—The winch was already placed, was it not?

A. It probably was.

Q. Probably was. And you have what is known as a wire rope that lets out the trawl and pulls it in, don't you? What do you call that? Is it the wire rope?

A. Yes, trawl lines.

Q. Trawl lines. Now, that condition existed in October of 1957, didn't it, that you had put the rig on and you knew what the rig was?

A. Yes, sir.

Q. If there was any repair to be made to this rig or fishing equipment, you and your crew members were the ones to make it, weren't you?

A. I didn't understand the first part of your question.

A. If there were any repairs to be made to the rig and equipment, you and the crew members would make it?

A. Majority of the time we did, but that time we brought it into the net shop. The majority of the time we did it ourselves.

Q. If there was anything to be done to the rigging—I mean the wire or the blocks, or necessary to have the [fols. 546-555] machine shop work on it, you would bring it in and request them to do whatever was necessary with it?

A. Yes, sir, if there was.

Q. Yes. Now, what were you doing in October 1957 when you claimed that there was some defective gear on the boat and you fell and hurt your back? Where were you?

A. What year is that?

Q. October, 1957.

A. Where was I in October, 1957?

Q. Where were you when you claim that a trawl slipped and caused you to fall and injury your back? The time you claim you got hurt in October.

A. Sir, I don't know how to answer—

[fol. 556]

STIPULATIONS OF COUNSEL

By Mr. Nickman: No, sir, not at this moment.

For the purpose of the record, it is stipulated by [fol. 557] and between respective counsel of record as follows: That during the years of World War Two, the plaintiff or the DeJean Packing Company or Elmer Williams applied for and obtained occupational deferments for captains and crew members aboard its vessels, by representing to the United States that the said captains and crew members were in an employment relationship with the plaintiff or with the DeJean Packing Company or with Elmer Williams, and, in accordance with such representation, the said plaintiff or the DeJean Packing Company or Elmer Williams filled out and filed appropriate forms, being Forms 42-A, 42-A Special and/or 42-A Special Revised, each of which was filed by the plaintiff, the DeJean Packing Company or by Elmer Williams alone or on behalf of the plaintiff and each of which aforesaid documents contained among other things a description of the duties of each registrant, the date on which he was employed, the date on which he entered his present job, his average weekly rate of pay, the average hours he worked per week, his prior work experience, and the name of the said registrant. Such registrant was either a captain or crew member aboard vessels [fols. 558-566] owned or operated by the plaintiff or the DeJean Packing Company or Elmer Williams.

[fol. 567] By Mr. Nickman: It is stipulated by and between counsel of record that Frank E. Price, Internal Revenue Agent of the Internal Revenue Service, commenced a social security tax investigation of the Williams Packing & Nav-

igation Company on March 19, 1956, and that his investigation in that connection continued through March 23, 1956; and that in connection with the aforesaid investigation the said Frank Price examined various books and records which he requested and which were furnished to him, and also discussed the matters in connection with those books with Mr. Lucius Frieberger; and that he also had discussions about the matter in general with Mr. Elmer Williams; and that Mr. Price, if called to testify, would state that in the course of his investigation he interrogated numerous captains and crew members who work aboard vessels of the DeJean Packing Company which were purported to have been leased by DeJean to the Williams Packing & Navigation Company, Inc. It is further stipulated and agreed [fols. 568-572] that on May 31, 1956, an informal conference was held in the office at Gulfport of the Internal Revenue Service, which was attended by the said Frank Price, by Mr. James F. McFatter, Group Supervisor of the Internal Revenue Service, and William Logan, also counsel under Power of Attorney for the Williams Packing & Navigation Company, associated then and now with Mr. Stanford Morse, also counsel for the Williams Packing & Navigation Company. This conference was held pursuant to a statement of proposed assessment to be made by the Internal Revenue Service in connection with the tax presently involved in the instant litigation.

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DEFENDANT'S EXHIBIT No. 14

Williams Packing and Navigation Co., Inc.

Boat Operations and Profit

Schedule A

	6-30-52	6-30-53	6-30-54	6-30-55	6-30-56	6-30-57	6-30-58
1 Income: Boat Operation.....	54,114.44	66,981.71	58,312.96	54,655.77	47,999.85	63,002.65	41,495.63
2 Expenses Boat Operation.....	59,065.45	74,034.36	86,220.27	85,476.14	98,520.74	92,470.52	83,163.09
3 Loss Boat Operation.....	(4,971.01)	(7,052.65)	(27,907.31)	(30,820.37)	(50,520.89)	(29,467.87)	(41,607.16)
Gross Profit—Sales							
4 Handling Charge.....	10,975.43	8,274.97	28,251.64	33,052.98	13,367.48	13,795.28	35,288.17
5 Total Gross Profit.....	6,004.42	2,192.32	344.33	2,232.61	(37,192.41)	(15,672.89)	(6,348.99)
6 Other Expenses.....	3,151.13	833.54	241.73	831.90	423.17	1,009.06	2,552.27
7 Net Profit or Loss.....	2,853.29	1,358.78	102.60	1,400.62	(37,615.58)	(16,791.65)	(8,901.26)
8 Surplus.....	51,126.67	52,485.45	52,588.05	53,988.67	16,373.09	(328.86)	(9,229.82)

(fol. 572b)

Williams Packing and Navigation Co., Inc.

Consolidation of Items

Schedule B

		6-30-54	6-30-55	6-30-58
Handling Charge—Added Schedule	B-1	18,226.40	17,783.52	26,928.00
Ice Expense—Omitted Schedule	B-3	—	—	11,556.17
Ice Crushing—Income—Added Schedule	B-3	—	—	3,222.06
*Totals				
FY— 6-30-56		18,226.40	17,783.52	41,706.23
FY— 6-30-57		0	0	

*These totals caused income of Williams Packing and Navigation Co. to be increased by their respective totals.

(fol. 572c)

Williams Packing and Navigation Co., Inc.

Handling Charge Adjustments

Schedule B-1

FY—6-30-54		DR.	CR.
Folio "B"			
J E—15	DeJean Packing Co. A/c Rec. Trade	\$18,226.40	
	Shrimp Sales		\$15,274.00
	Oyster Sales		2,952.40
	To provide for handling charges due from DeJean as Vendee 7,637 bbls. shrimp @ 2.00	\$15,274.00	
	295,240 cans oyster @ 1¢	2,952.40	
FY—6-30-55			
Folio "C"			
J E—13	DeJean Packing A/c Rec. Trade	17,783.52	
	Shrimp Sales		16,093.50
	Oyster Sales		1,690.02
	To reflect additional charges for handling Shrimp, 10,729 Bbls. @ 1.50	16,093.50	
	Oysters, 337,895 cans @ 1/2¢	1,690.02	
FY—6-30-58			
Folio "B"			
J E—15	DeJean Packing Co. A/c Rec. Trade	26,928.00	
	Shrimp Sales		26,928.00
	To reflect increase in handling charge for shrimp sales to DeJean for FY—6-30-58 from \$1.50 to \$7.50 per barrel per agreement (Increase \$6.00 x 4,488 Bbls)		

[fol. 572d]

Williams Packing and Navigation Co., Inc.

Handling Charge Per Unit

Schedule B-2

	6-30-54	6-30-55	6-30-56	6-30-57	6-30-58
1. Handling charge per monthly invoices					
Shrimp—Per Bbl.....	\$1.00	1.00	1.50	1.50	1.50
Adjustment—end of year	2.00	1.50	0	0	6.00
Total Charge.....	<u>\$3.00</u>	<u>2.50</u>	<u>1.50</u>	<u>1.50</u>	<u>7.50</u>
2. Oysters Per Can.....	1/2¢	1/2¢	1/2¢	1/2¢	1/2¢
Adjustment—end of year	1¢	1/2¢	0	0	0
Total Charge.....	<u>1 1/2¢</u>	<u>1¢</u>	<u>1/2¢</u>	<u>1/2¢</u>	<u>1/2¢</u>
Handling Charge in Total Dollar Value					
3. Per Invoices.....	10,025.24	15,269.46	13,337.48	13,795.28	8,330.17
Adjustment—end of year.....	18,226.40	17,783.52	0	0	26,928.00
Total Year.....	<u>\$28,251.64</u>	<u>33,052.98</u>	<u>13,337.48</u>	<u>13,795.28</u>	<u>35,258.17</u>

[fol. 572c]

Williams Packing and Navigation Co., Inc.

Other Items Affecting Income

Schedule B-3

1958 Only

Ice Expense
FY

6-30-51	\$ 9,737.87
6-30-52	7,826.40
6-30-53	12,816.87
6-30-54	12,037.54
6-30-55	13,694.45
6-30-56	12,385.26
6-30-57	12,967.16
6-30-58	0

Ice is Paid for by DeJean

A year end adjustment is normally made charging Williams Pkg. and Navigation Co., Inc. 50%

Such adjustment was not made FY 6-30-58
DeJean claimed \$23,112.34 6-30-58

FY 6-30-58

Ice crushing Income \$3,222.06

Williams Packing Co. sets up a liability to DeJean as a/c payable—Ice.

At the end of the year this item is normally closed out by crediting A/c Receivable Trade, DeJean.
In FY 6-30-58 this item was closed direct to profit and loss.
Shown as a sale by Williams Pkg. Co.
Resulting in more profit to Williams Pkg. Co. than earned.

Prior FY 6-30-58

0

Williams Packing and Navigation Co., Inc.
Comparison of Adjustments

Schedule C

	6-30-52	6-30-53	6-30-54	6-30-55	6-30-56	6-30-57	6-30-58
Net Income or Loss	2,853.29	1,358.78	(18,123.80)	(16,382.90)	(37,615.58)	(16,701.63)	(50,936.06)
Net Income or Loss	0	0	18,226.40	17,783.52	0	0	41,706.23
Net Profit or Loss	2,853.29	1,358.78	102.60	1,400.62	(37,615.58)	(16,701.63)	(8,901.26)
Net Profit or Loss	51,126.67	52,485.45	52,588.05	53,988.67	16,373.09	328.52	(9,229.82)

[fol. 573] DEFENDANT'S EXHIBIT No. 14

STIPULATION OF COUNSEL

By Mr. Nickman: It is further stipulated by and between counsel that there may be received in evidence as Exhibit 18 photostatic copy of a document on the stationery of the DeJean Packing Company addressed to Captain Oduse Trahan, below whose name appears in quotations "Ophelia Williams," and reading, "Dear Captain Trahan," caption, "shrimp prices," and signed or appearing in typewriter at the bottom the name "DeJean Packing Company."

By Mr. Morse: We object to that as being immaterial and irrelevant, and the document on its face shows that it was not signed by any partner of the DeJean Packing Company or at the direction of any partner of the DeJean [fol. 574] Packing Company, or was mailed at the direction of any partner of the DeJean Packing Company.

By the Court: Overrule the objection.

By Mr. Nickman: The aforesaid document is dated April 13, 1954.

By Mr. Nickman:

(Same received in evidence and marked Defendant's Exhibit No. 18, which exhibit is copied here below.)

DEFENDANT'S EXHIBIT No. 18

DeJean Packing Company

Since 1921

Producers and Shippers of Frozen and Canned Seafoods

Telephone 6421

Plants

Biloxi, Miss.

Braithwaite, La.

Myrtle Grove, La.

Post Office Box 52

Biloxi, Miss.

April 13, 1954

Capt. Oduse Trahan,
"Ophelia Williams."

DEAR CAPT. TRAHAN:

Shrimp Prices

Sales of shrimp, both canned and frozen, have been very slow for the past three or four months, and unfortunately, the outlook for improved conditions is not good. As a result of this lack of sales, and the fact that considerable shrimp is held by both packers and freezers, selling prices have declined considerably. What sales we are making today are made at prices at, or very close to, our cost of production. This is not a good situation, for you or for us.

Please be advised that, effective April 19th, we will pay the following scale of prices for *Heads-on Shrimp, delivered to our plant*:

Count	Price per Barrel
1-15.....	\$60.00
16-20.....	55.00
21-25.....	50.00
26-30.....	45.00
31-35.....	40.00
36-40.....	35.00
41-50.....	30.00
51-60.....	27.50
61-68.....	22.50

The above prices are what we feel we can pay at this time, however, we must put you on notice to the effect that

should conditions require it, *these prices are subject to change on very short notice.*

Your cooperation will be appreciated.

Very truly yours, DeJean Packing Company.

[fol. 580]

STIPULATIONS OF COUNSEL

By Mr. Nickman: It is stipulated and agreed by and between respective counsel of record that there may be received in evidence as Defendant's Exhibit No. 22 Twenty-seven separate pages, being statements of account of the Williams Packing & Navigation Company, Inc., at the Peoples Bank of Biloxi, and that the said series of bank statements extend from the period July 31, 1953 to the period March 31, 1958, and that each of the aforesaid bank statements shows a series of bank overdrafts by the Williams Packing & Navigation Company, Inc.; and the offer of this document is made for the purpose of establishing that the relationship between Williams Packing & Navigation Company and the DeJean Packing Company is such that the Peoples Bank of Biloxi in honoring successive overdrafts relied upon the credit of the DeJean [fol. 581] Packing Company as a partnership and/or the credit of Elmer Williams, either as the managing operator of that partnership or as an individual or as the president of the Williams Packing & Navigation Company, Inc., whichever the case may be.

By Mr. Nickman: It is stipulated by and between counsel of record that there may be received in evidence as Defendant's Exhibit No. 23 a document consisting of 16 pages, being the partnership information returns for the DeJean Packing Company respectively for the fiscal years ending 6/30/55, 6/30/56, 6/30/57, and 6/30/58, and that document is a photostatic copy of each of the respective originals of the aforesaid partnership information returns. This document is being offered for the purpose of establishing the net worth of the DeJean Packing Company as [fols. 582-587] of the fiscal year ended 1958, which net worth shows that the DeJean Packing Company can pay the tax involved herein and that the companies, DeJean

Packing and the Williams Packing & Navigation Company, have been established by the defendant's evidence to be so closely intertwined, it is therefore immaterial whether the Williams Packing & Navigation Company itself can pay the tax or whether the DeJean Company pays the tax.

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[fol. 588]

After Recess

GEORGE WILLIAMS, called as a witness and having been duly sworn, testified as follows:

Direct examination.

By Mr. Nickman:

Q. What is your full name?

A. George A. Williams.

Q. Where do you live?

A. 606 Maple Street, Biloxi.

Q. Are you married?

A. Yes, sir.

Q. Do you have a family?

A. Four children.

Q. What has been the extent of your schooling?

A. Well, high school and various correspondence courses.

Q. Were you——

A. —Plus service school.

Q. Were you in the service of your country during the war?

A. Yes, sir, I was in Naval Radio Intelligence during the war.

Q. Were you drafted or did you enlist?

A. I enlisted.

Q. What year was that?

A. 1942, February 22nd.

[fol. 589] Q. I will ask you to repeat so the Court can hear whether you enlisted or were drafted.

A. I enlisted February 22, 1942.

Q. How old were you when you enlisted?

A. 19 years old.

Q. Do men of that age frequently go aboard fishing vessels?

A. Yes, sir.

Q. Did you receive an honorable discharge from the service?

A. I did.

Q. Mr. Williams, I understand that you have worked on independent boats and you have worked on company-owned boats. I am going to ask you to confine your answers, except where you indicate otherwise, to your experience and observations while you were on company-owned boats. Were you on company-owned boats in some capacity of the DeJean Packing Company or of the Williams Packing & Navigation Company?

A. Yes, sir, I was.

Q. What capacity were you on those vessels?

A. As a crew member.

Q. Will you please tell us what vessels you were on?

A. I was on the Elmer Williams II, and also the Connie Ann. I made three or four trips on there. Probably I worked on the Connie Ann about three months—some [fol. 590] where along in there.

Q. Was the Elmer Williams II a company-owned boat?

A. Yes, sir, it was.

Q. You were a crewman aboard that?

A. I was.

Q. Can you tell us the approximate period that you were aboard that vessel?

A. I was on there once in '46 and '47, and then in 1953 and '54 up until 1955.

Q. Do you remember the period of time you were on the Connie Ann?

A. Well,—

Q. Approximately.

A. Approximately—latter part of '53 or '57. I'm not too sure.

Q. Were you a captain or a crewman on that vessel?

A. I was a crew member.

Q. Now, during the period of time that you have been aboard the vessels you have just mentioned, as well as perhaps some independent vessels, have you had occasion

to observe the back shed of the property of the DeJean Packing Company as viewed from the Gulf?

A. I have, sir.

Q. Have you seen any sign on that property?
[fol. 591] A. I have.

Q. Was there any writing on the sign?

A. There was.

Q. What did that writing say?

A. That sign stated that if there were no company freight boats in the vicinity where a catch was made that the boats were to bring their shrimp back to the dock.

Q. Have you observed whether that sign is up there now?

A. No, sir. The last I saw of it was about a year or year and a half ago.

Q. Had it been there over a period of years prior to that, from your observation?

A. I would almost be correct in saying it went up around 1948.

Q. Had it continued to remain up there from your observations from time to time?

A. It did.

Q. On the company-owned vessels that you worked, did you find that there was any limitation on the ice?

A. There was.

Q. What was the nature of the limitation?

A. In 1953 or '4, it was in the summertime, the season had just opened in Louisiana, so it had to be in August because it was still warm. We were on a six ton limit [fol. 592] on ice. The reason I say this is because my dad was sick at this particular time and my brother was acting captain, James Williams. We made a trip to Point Chicot and found a few shrimp and worked there three days, and I think we brought in around sixteen or eighteen barrels. The reason we had to come in is because we ran short of ice. The following trip we went to DeJean and boxed in the wing boxes in some of the hold in order to cut down some of the air space in there. In other words, to pinpoint the date on this—Mr. Frieberger has the record—Nick Skremetta was the one that cut the bottom planks to go in that boat. He was working for Mr. Williams' shipyard at that time.

Q. What was the reason this was boxed in?

A. Too much open space of the amount of ice we were receiving. It melted too quick.

Q. Do I understand you mean by reducing the amount of space, you were able to conserve the melting ice?

A. Right.

Q. Suppose you had been free to get more ice on the vessel than you did. What would have been the situation as to the duration of the trip?

A. The duration of the trip would have been much [fol. 593] longer because we could have stayed at least two or three more days and probably made a lot better trip.

Q. So the limitation on ice controls the number of days you are able to fish?

A. Yes.

Q. Now, on the trips you were on, Mr. Williams, did you receive any bonuses as a crewman?

A. Well, yes and no. The captain actually received that bonus, well, I say as an incentive for better production. But I've been on boats where the captain split the bonus.

Q. Now, have you found any other limitations in your experiences aboard vessels owned by the company,—limitations of other types as to your activities, or restrictions as to amount that you could bring in or size of barrels or quantities?

A. Well, I remember one occasion in 1954, either June or July, because at that particular time my mother in law had a heart attack and she was in the hospital. I left from the hospital one afternoon around one o'clock to go down. I was with my father on the boat at that time. And Mr. Hall—I don't think he is in here now—he met us on the dock right where the oyster washing machine was; [fol. 594] that's where we were tied up. At that particular time the boats were going out in teams three or four at a time. I think it was because production was up; they had plenty of shrimp on hand. Mr. Hall told us we could go out the following day but not to bring over thirty barrels of shrimp.

Q. Now, while you were on company-owned vessels, did you have occasions from time to time to provision the ship with groceries?

A. I did. I was the cook on there.

Q. Where did you get your groceries?

A. I got the groceries at Hall's Grocery.

Q. Was there any particular reason why you patronized Hall's in preference to some other place?

A. No, sir. When I went to work at Williams Packing & Navigation Company that was the common practice. I just fell in line with it.

Q. Did you have any experience with so-called sales to outside parties in which you delivered catches to persons or organizations other than the DeJean Packing Company?

A. On one occasion that we delivered to an outside company was in that period of '53 or '54. I can't pinpoint it, but we came into the dock and Mr. Hall sent us—and the other boat was the Connie Ann—Hover to Victory [fol. 595] Packing Company to unload. I think that was because they had several boats tied up at the dock at that time with catches on them.

Q. Have you had requests by Mr. Williams or someone acting for the DeJean Company to go out on a particular trip or leave a particular day, or have you heard or seen other persons requested to leave or go out on any occasion on the part of Elmer Williams or anyone acting for the company, that either you or others operating the boats in the area should be going out on trips?

A. The only occasion I had of that was when Mr. Hall told us to go out on that one particular trip I mentioned.

Q. Did you make any comparison or have you had occasion to make any comparison of the relative price of groceries at Hall's Grocery Store as compared with the prices of similar items in other grocery stores?

A. Well, there's one incident, but the other store involved was not a grocery store. We had went in there to grub up, what it's commonly called among the fishermen, and during the summer months or all year around now there's a rubber glove the fishermen use because of the high acid content in the brown shrimp as well as the sand [fol. 596] to a particular type of bottom where they are caught. Unless you have that glove your hands are pretty badly eaten up. Mr. Hall was out of this particular item, and the store truck—Richard Miller was driving it—on

the way to the boat we stopped at Covich's Pharmacy and got two pair of these gloves. He paid Covich's Pharmacy 59¢ for them, and he charged us \$1.25 on the grub bill.

Q. What about the shelf prices of standardized staple groceries you obtained at Hall's, as compared with the shelf prices of the same type of staple items—for example, eggs or any other product you bought?

A. I bought there for my own use for quite some time from Mr. Hall and on comparison with prices, there might have been a few cents difference.

Q. Did you find when you bought groceries as an individual for your own use there was a different price than when you bought them for provisions on the vessel?

A. Yes, sir, there was a difference.

Q. Was the difference greater or lesser?

A. It was greater where the boat consumption was concerned.

Q. When you are aboard these company-owned vessels, does the DeJean Packing Company or Elmer Williams tell you what to do?

[fol. 597]—A. No, sir, they don't.

Q. Why not?

A. Well, that's always the operation of the captain. The captain acts in the capacity of a foreman for the company. He hires the crew, which I don't think the company officials would be able to do because the captain has to know if that crew is capable of carrying on the functions of that boat or whether they can maintain a working relationship among themselves that will be pretty stable over a period of time. You've only got a restricted area, and you're on that boat; you can't get off and get outside the confines of that boat because it's impossible. The officials of the company might have a working knowledge of just how that boat operates, but I don't think they would be in a position to select a crew for the captain.

Q. Is it your point then that someone has to be in charge, and that is the captain?

A. Yes.

By Mr. Nickman: You may inquire.

Cross-examination.

By Mr. Morse:

Q. Mr. Williams, point out where you are in this picture. You are the one carrying the placard on the right [fol. 598] hand side?

(indicating)

A. That's right.

By Mr. Nickman: May I make a statement at this point?

By the Court: Yes, sir.

By Mr. Nickman: The photographs which counsel has relate to a labor dispute, and we are going to object to anything that involves a labor dispute, because this is a tax case, and, as I indicated in my opening, we are not concerned with any labor disputes in this litigation.

By the Court: I will overrule the objection because I think it is admissible upon the question of interest of the witness. In other words, It is admissible for the court to have the knowledge in weighing the testimony of all the witnesses. So, overrule the objection.

Q. This placard you are carrying, George, states what?

A. It says, "On Strike, DeJean Packing Company, Williams Packing & Navigation Company. Unfair to the Fishermen & Allied Workers Union, Affiliated with NMU AFL-CIO."

OFFER IN EVIDENCE

By Mr. Morse: We desire to offer that as an exhibit.

By Mr. Nickman: The Government objects to this exhibit as being completely immaterial to the issues in this [fol. 599] case, as to whether or not the tax in this case was legal, and, as to whether or not this taxpayer or its related organization has the ability to pay and as to whether or not this taxpayer has unusual or exceptional or extraordinary circumstances which would prevent it from paying the tax. We say this photograph is entirely immaterial to those two issues.

By the Court: Well, it has no bearing upon that issue but does have a bearing upon the weight of the testimony that is to be considered by the court. As to whether it

affects the final analysis of course would be for the Court to determine in weighing the testimony of all witnesses. So I overrule the objection and admit it for that purpose.

By Mr. Morse: And we offer it for the further purpose of showing that the fishermen, at least the ones on strike, knew where the Williams Packing & Navigation Company was, as the sign so indicates.

By Mr. Nickman: May I have a statement for the record as to the date the photograph was taken?

By Mr. Morse: I would say some time in May.

By the Witness: May or June.

By Mr. Morse: May or June, 1958.

By Mr. Nickman: That is beyond the tax period.

By the Court: I will overrule the objection. It is permissible if it happened yesterday, because it is to be considered by the Court in weighing the testimony of any witness. Overrule the objection.

(Same received in evidence and marked Plaintiff's Exhibit No. 36, which exhibit is not copied here because upon order of the Court the original exhibit will be sent up with this record.)

Q. Mr. Williams, when this strike was on, you were not on any boat of the Williams Packing & Navigation Company were you?

A. When it went on?

Q. Yes.

A. No, sir, I was on an independent boat.

Q. And the independent boat was a boat of your brother?

A. Right.

Q. Horace Williams?

A. Right.

Q. And Horace went back to work?

A. He did.

Q. And you stayed out on strike and didn't go back on your brother's boat?

A. I didn't because I got fired.

Q. Sir?

A. I didn't because I got fired.

Q. By your brother?

A. By his wife.

[fol. 601] Q. I see. Look at that letter and see if you can state what that is.

(Hands to witness)

A. Yes, I know what it is.

Q. What is that letter?

A. That is a letter prepared by counsel for the Fishermen and Allied Workers Union, signed by me. But it was prepared by legal counsel. I'm not that much of a mental giant.

Q. I knew that from reading it. Was it—It doesn't sound like my nephew. Was it he or was it Mr. Kerr in New Orleans?

A. Mr. Kerr.

Q. I knew it didn't sound like Josh. This letter is dated June 16, 1958, and directed to the United States Department of Justice, Washington, D. C., and it purports to deal with the trial of the present case, does it not?

A. Yes, sir.

Q. And your objection to Mr. Hauberg's handling the trial of this case for the United States Department of Justice?

A. There was no objection on my part.

Q. I understand, but you signed the letter?

A. I signed it.

[fol. 602] Q. And you knew what its contents were?

A. But I don't think there's an objection, stating in there that we objected actually to Mr. Hauberg.

Q. I understand, but you would rather have had someone else substituted in his place?

A. That was for Mr. Hauberg's protection in case there would be some vindictiveness on the part of the fishermen and packers, as well as in conjunction with the anti-trust suit.

Q. And I notice a copy was sent to Mr. Hauberg.

A. Yes, sir.

Q. And a copy to the Social Security Administrator.

A. Yes, sir.

Q. A copy sent to the newspapers?

A. Yes, sir.

Q. A copy sent to congressmen?

A. Yes, sir.

Q. A copy sent to clergymen?

A. Yes, sir.

Q. And a copy to the United States Attorney-General?

A. Yes, sir, and I only got one answer from it, Mr. Morse, and that was from Bill Colmer.

Q. I'm surprised you got any. You didn't get one from your local priest?

A. I'm not Catholic.

[fol. 603] By Mr. Morse: We desire to offer this in evidence for the purpose of showing Mr. Williams' interest in this case. We will let Your Honor read it, and if your Honor feels it should or should not go in——

By Mr. Nickman: We object on several grounds. The first ground is that it is wholly immaterial and irrelevant to the case. That is one. Two: I don't know what it proves. Three: Mr. Hauberg obviously has not.——

By the Court: —I haven't read it yet, but the only relevancy it has, if any, would be whether or not it goes to the weight of testimony, and you may state your objections to the record.

By Mr. Morse: Before he states it, I will state that is solely the purpose of it.

By Mr. Nickman: I state for the record, as the Court is perfectly aware, Mr. Hauberg, the United States attorney, has not actively participated in the conduct of this trial.

By the Court: I believe I will sustain the objection on this. I will let it be marked and made part of the record, but I will exclude it from consideration by the Court in reaching a judgment in the case.

By Mr. Nickman: May I add further remarks to supplement my objection? It contains matters——

[fol. 604] By the Court: I don't think, Mr. Nickman, it is necessary for you to state them further, since I have ruled with you.

By Mr. Nickman: Thank you Sir.

(Same received in evidence and marked Plaintiff's Exhibit No. 37, which exhibit is copied here below.)

PLAINTIFF'S EXHIBIT No. 37

Biloxi, Mississippi

June 16, 1958

United States Department of Justice,
Washington, D. C.

DEAR SIRs:

Re: United States v. Elmer Williams, d/b/a DeJean Packing Company of Biloxi, Mississippi

An unusual situation has presented itself with regard to the captioned matter, which, according to the writer's information, involves a claim by the United States, through its Department of Social Security, that the Williams' fishing interests should collect and pay Social Security benefits relative to the fishermen who work on the Williams' fishing boats.

The fishermen have been on strike for the past several weeks for a principal reason that Williams will not recognize them as employees. Williams has stated that if he does recognize the fishermen as employees at this time that will be tantamount to his admitting liability in the above [fol. 605] captioned lawsuit which will cost him forty or fifty thousand dollars in back Social Security taxes.

The fishermen and Williams are at an impasse because he cannot consider recognizing them as employees until after the disposition of the above lawsuit.

The above styled action by the Government against Williams is pending on the docket of the United States District Court for the Southern District of Mississippi, Southern Division, in Biloxi.

The interests and also livelihoods of many citizens in this area may possibly be affected by the outcome of this lawsuit.

The fishermen, now unemployed, are available at any time to be interviewed by the Social Security Department as witnesses to determine the factual evidence to be presented.

The term of the Federal Court is presently in session.

It is understood that the docket of the Court is congested, which congestion, of course, is due to no fault on

the part of the Court or its officers or the United States Attorney.

It is respectfully suggested that the Government, which is the party litigant herein, through its proper agency, such as the Department of Justice, Department of Social Security, or other department, should move the Court for pre-[fol. 606] erential or summary hearing, trial, or disposition of the above captioned case.

We are sending a copy of this letter to the Honorable Robert Hauburg, United States Attorney for this division, with the request that he kindly communicate with you concerning the above suggestion.

In deference to Mr. Hauburg, the following related situation may be noted:

During 1955 Mr. Hauburg was required in the performance of his duties, to handle for the Government an anti-trust case bearing the number 7192 of the criminal docket of this court, entitled "United States v. Gulf Coast Shrimpers & Oystermen's Association, et als." wherein he contended and established for the Government that the fishermen were in effect independent contractors and not employees in the Biloxi area.

It is considered by some persons that the Government's position in the above captioned Social Security case against the Williams' interest is not entirely consistent with its position three years ago in the anti-trust suit, for the reason that now the Social Security Department is contending that the Biloxi fishermen are employees whereas the Anti-Trust Department formerly contended that the Biloxi fishermen were not employees. It has been suggested that it may be embarrassing, and therefore unfair, to an able [fol. 607] and conscientious attorney such as Mr. Hauburg to require him to assume positions which may contradict each other. To avoid this situation, which is not of Mr. Hauburg's making, could you not designate special counsel for the Government to prosecute the captioned matter.

Finally, may reference be made to the opinion of the chief area office of the Social Security Administration, Birmingham, Alabama, through Mr. Ellis Listerman, dated November 25, 1955, to the effect that the fishermen are entitled to the benefits of the Social Security Act.

The paradox presently existing stems from the fact that

a recent ruling prevents the fishermen from even voluntarily coming under the Social Security Act.

Are the fishermen prevented from electing to come under the Social Security Act because they are automatically under it?

The Williams' interests have the Social Security Administrator temporarily enjoined in accomplishing for the fishermen what they need, namely, Social Security. If the temporary injunction continues indefinitely it will stop being only temporary. Should not an early hearing be had on the question of a permanent injunction? To whom should the fishermen give the facts of the case? When do the witnesses testify?

Going forward with these matters will be a constructive [fol. 608] step. To the fishermen it may be imperative for the earning of a livelihood.

Thank you for your consideration and cooperation.

With expression of respect,

Sincerely, /s/ George Williams.

cc: Mr. Hauburg.

cc: Social Security Administrator.

cc: Newspapers.

cc: Congressmen.

cc: Clergymen.

cc: United States Attorney General.

By Mr. Holmes: I would like to make a statement for the record. Mr. Nickman said Mr. Hauberg had not actively participated in the trial. I want to state for the record his chief assistant, who is now talking, has been in this trial from the beginning and has done everything he could to assist every way he could in the case. As long as the other case is not in the record—

By Mr. Nickman: My statement was "in the actual conduct of the trial."

By Mr. Morse: We admit that is true.

By the Court: Yes.

Redirect examination.

[fol. 609] By Mr. Nickman:

Q. Have you paid at any time any severance taxes or boat license fees or fees of any kind to the State of Louisiana in connection with the times that you were fishing aboard company-owned vessels?

A. No, sir, I haven't.

Q. Did you ever file during those same periods any partnership information return with the United States Government?

A. No, sir, only individual returns.

Q. Only individual. Have you paid at any time any self-employment tax as a self-employed fisherman?

A. No, sir.

Q. During the time you were on these vessels, where did you usually get your fuel oil for the vessels when they were in dock?

A. Got it at the company oil dock.

Q. Did you ever get it any other place when you were in dock?

A. No, sir, not in the time I was down there.

Q. Did you ever make any price comparison for fuel of other lubricants used aboard the vessels which were supplied at the company dockside with prices at other places that supplied the same materials?

A. Yes, sir, I have compared oil bills, and there was a [fols. 610-615] deviation of from maybe 1½ to 2¢ a gallon on diesel oil and up to 60¢ a gallon on lube oil.

Q. The deviation was which way?

A. It was higher down at Williams Packing & Navigation Company.

Q. Were you expected to obtain your fuel requirements dockside at the DeJean Company plant?

A. That was the common practice down there.

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[fol. 616] WILFORD BOURQUE, called as a witness and having been duly sworn, testified as follows:

[fol. 617] Direct examination.

By Mr. Nickman:

Q. What is your full name?

A. Wilford Bourque.

Q. Where do you live?

A. 308 Pine Street, Biloxi, Miss.

Q. How far did you go in school?

A. Eighth grade.

Q. Have you worked for the DeJean Company?

A. Yes, sir.

Q. From when to about when? What year to what year?

A. From 1940 to 1958.

Q. In other words, for eighteen years you were working on boats for DeJean Company?

A. Yes, sir.

Q. Were you a crewman or a captain.

A. Crewman.

Q. Were you in World War Two?

A. Yes, sir.

Q. I don't think you understood.

A. No, sir.

Q. You did not serve in the war?

A. No, sir.

Q. You say you didn't serve in the war. Then you must have been deferred. Were you?

[fol. 618] A. Yes, sir.

Q. Can you tell us the circumstances under which you received a deferment? Where were you registered, with what board?

A. Abbeyville, Louisiana.

Q. Will you please tell us just exactly what happened, how you got your deferment and what developed?

A. I was out on a boat and my wife wrote me a letter—

By Mr. Morse: We object to what his wife wrote.

By the Court: Yes.

Q. Tell us what happened. You were on a boat of the DeJean Company?

A. Yes, sir.

Q. And you received some kind of notice?

A. Yes, sir.

Q. Tell us what happened.

A. Had to report at Abbeville the next morning for physical examination at nine o'clock. I left and got home at two o'clock. I got on the Greyhound bus and went to Lafayette; from Lafayette I went to Abbeville local board and went up there and asked about it and the fellow told me to come to Biloxi and forget about it. By that time I had a telephone call to report here at nine o'clock for a physical examination and I couldn't make it. I got [fol. 619] back over here and I had some papers.—

Q. What?

A. Papers to fill out. I took the papers up to the factory and Miss Parker filled it out.

Q. Who is Miss Parker?

A. Bookkeeper.

Q. What bookkeeper?

A. At DeJean.

Q. Bookkeeper at DeJean Packing Company?

A. Yes, sir.

Q. This paper you got, where did that come from?

A. Abbeville, local board.

Q. And you took it and gave it to Miss Parker?

A. Yes.

Q. Then what happened?

A. She filled it out and sent it out and then I got a deferment, a 1-A card for three months. They sent me some more papers.

Q. Who?

A. The local board from Abbeville. Then I took them up to the office and she filled it out for me and I got a 2-A card, six months deferment.

Q. You took it back up, and you say "she." You mean Miss Parker?

A. Yes.

[fol. 620] Q. The same Miss Parker that worked at the DeJean Company?

A. Yes, sir.

Q. And you got the second deferment. Is that right?

A. Yes, sir.

Q. Have you had occasion, while you were working on the DeJean Company boats, to get groceries for the boat, grub?

A. Yes, sir.

Q. Where did you get the groceries?

A. Hall's Grocery.

Q. Hall's Grocery Store?

A. Yes, sir.

Q. While the boats that you worked on were in port, did you ever get any groceries anyplace else?

A. No, sir.

Q. Were you able to get everything you always wanted to get?

A. Some things, yes.

Q. Were there some things you couldn't get?

A. Yes, sir.

Q. What about cigarettes?

A. Well, one time Mr. Elmer told us that he was going to stop the cigarettes and stuff, if we was not buying the grub. We got mad and had a argument between us, so [fol. 621] we didn't go out that trip, stayed tied up a couple of days, and he decided we could buy cigarettes.

Q. He changed his mind and let you get cigarettes, is that correct?

A. Yes.

Q. Now, have you seen other captains and crewmen have the same problem?

A. Yes.

A. Did you ever have occasion to get any equipment or gear for the boats?

A. Yes. I had to get—the captain usually tell us to get it and we have to go get our orders. If they didn't have it in the shop, the factory would have to get orders from Eldon Murrell.

Q. Who is Eldon Murrell?

A. Working in the trawl shop.

Q. You mean at DeJean?

A. Yes.

Q. Did you go in there and pick out anything you wanted?

A. No.

Q. How did you get it?

A. Had to see him first.

Q. Had to see Eldon Murrell?

A. Yes.

[fol. 622] Q. And Eldon Murrell was in charge of the DeJean trawl shop?

A. Yes.

Q. Now, did you ever pay any severance taxes to the State of Louisiana?

A. No.

Q. Did you ever pay any license fees?

A. No.

Q. Or permits in order to fish in those waters?

A. No.

Q. Did you have occasion—Were you on the Ronald Jr.?

A. Yes.

Q. Did you have occasion while you were on that boat to hear over the loudspeaker on the boat some kind of an order about unloading?

A. Yes.

Q. What happened?

A. We was coming in one morning from cross the river and got to Ship Island Point at five o'clock in the morning and Ramsey Girouard called Sylvester Langlinais and told them to go to Gulfport and unload what we had.

Q. You were in court when Mr. Ramsey Girouard testified?

A. Yes, sir.

Q. Did you hear his testimony?

[fol. 623] A. Yes, sir.

Q. And this incident you just told us about, over the loudspeaker, is that the same incident he was describing?

A. Yes.

Q. About the unloading?

A. Yes.

Q. At Gulfport?

A. Yes.

Q. Mr. Bourque, you have a lawsuit, do you not, against the Williams or the DeJean Company?

A. Yes.

Q. Did you read the complaint in that suit that you filed? Have you read that?

A. Part of it, but not too much.

By Mr. Nickman: You may inquire.

Cross-examination.

By Mr. Morse:

Q. You were one of the first ones that went out on strike against Williams Packing & Navigation Company, weren't you?

A. Not that I recall.

Q. You went out when Sagasta Langlinais went out?

A. Yes, sir.

Q. Same day?

[fol. 624] A. Yes, sir.

Q. That was right when the strike started, wasn't it?

A. Not that I remember.

Q. You were on the picket line down there, weren't you?

A. Yes.

Q. Threw a picket line across the entrance to DeJean and Williams Packing Companies?

A. Yes.

Q. And you stayed on it and didn't go back as a crew member?

A. No.

Q. Who selected you as a crew member?

A. Sagasta.

Q. You were talking about not getting cigarettes from Hall's Grocery one time because Mr. Williams put a stop to it, and you and several other boat captains refused to go out until he did agree that the captain and the crew could buy cigarettes and charge them to the boat?

A. Yes.

Q. And in other words, you all sort of had a sitdown strike, refused to go out until he would allow you to buy the cigarettes?

A. We refused to go out until he agreed to give us what we needed.

Q. And cigarettes was part of what you needed?

[fol. 625] A. Yes.

Q. And if you wanted beer or wine or whisky or drugs?

A. No, that's one thing we never did buy, beer or whisky.

Q. If you had wanted that, you would have bought it and charged it to the boat?

A. I imagine so.

Q. Now, when Ramsey Girouard called you, he was captain on another boat, wasn't he?

A. Yes.

Q. And you don't know who told him to call you, of your own knowledge? I'm not asking you what Ramsey said somebody told him. I'm asking you to tell the court of your own knowledge who told Ramsey to call you.

A. Ramsey called and said Leon had said—

Q. I'm not asking you what he said Leon said. I'm asking you to just tell us what Ramsey said. I'm not talking about what Ramsey said about what somebody told him, if you understand what I mean.

A. Yes, I understand. Well, Ramsey told Langlinois to remain in Gulfport and unload his catch, is all.

Q. That's right. About your deferment, you don't know who signed up to get your deferment, do you?

A. No.

Q. As a matter of fact, practically all of you fishermen [fol. 626] were deferred from time to time because you were catching food for the Armed Forces and for the consumption in the United States, weren't you?

A. I imagine so.

Q. You didn't serve in the Army?

A. No.

Q. You didn't have to go?

A. No.

Q. And you were working as a fishermen during the war years?

A. Yes.

Q. When you would go to Eldon Murrell—he was in charge of the trawl shop?

A. Yes.

Q. When you would go to Eldon, that was because you needed something that DeJean or Williams Packing didn't have. Isn't that true?

A. Yes.

Q. And you would have to go to Leon to get an order, what is called a purchase order,—

A. Yes.

Q. —to go out and buy from whoever had it.

A. Yes.

Q. From whatever person could supply that to you, whether it was a steel cable or a trawl or a board or what- [fol. 627] ever you wanted.

A. Yes.

Q. Then when you would get those, whenever you needed any gear, then you and the captain and another crew member if there was one, you would rig the gear up like you wanted it?

A. Yes.

Q. And you didn't take orders from anybody, except you and the captain and the crewmember, about doing it?

A. No.

Q. Mr. Williams didn't supervise that?

A. No.

Q. Mr. Williams had nothing to do with hiring you?

A. No.

Q. Neither did Leon Hall or anybody else connected with DeJean?

A. No.

Q. And you knew they couldn't recall you? The captain would fire you?

A. They would put the pressure on the captain.

Q. The captain would be the one to fire you?

A. If he wasn't satisfied he had the right to fire you.

Q. Did you ever know of an instance?

A. No.

[fol. 628] Q. You have been there eighteen years?

A. Yes.

Q. And you know of no instance where that was ever done?

A. Not.

By Mr. Morse: That's all.

Redirect examination.

By Mr. Nickman:

Q. Mr. Bourque, when you got that deferment from the draft, did you speak to Mr. Morse about it?

A. No, sir.

Q. You never saw Mr. Morse about it, did you?

A. No.

Q. Did you see anybody else except the people at the DeJean plant, Miss Parker?

A. No.

Q. You didn't see anybody but Miss Parker?

A. No.

Q. During the eighteen years that you worked there, did you ever see a sign on the rear of the shed?

A. Yes.

Q. You did?

A. Yes.

Q. Did that have any printing or lettering on it?

A. Yes.

Q. What did it say?

[fol. 629] A. Says to our fishermen, catch boats, if they ain't got no freight boat round to bring the catch to the wharf.

.

FERDINAND SMITH, called as a witness and having been duly sworn, testified as follows:

Direct examination.

By Mr. Nickman:

Q. State your name.

A. Ferdinand Smith.

Q. Where do you live?

[fol. 630] A. 420 Pine Street, Biloxi, Mississippi.

Q. How far did you go in school?

A. Second grade.

Q. Are you working in the fishing industry at the present time?

A. No, sir.

Q. What do you do?

A. Service station attendant.

Q. How long have you been on that job?

A. Right at two months?

Q. How long have you not been connected with the fishing industry?

A. Since last April.

Q. Last April of 1958?

A. Yes.

Q. That was before the strike?

A. Yes.

Q. Have you worked on company-owned boats of the DeJean Packing Company?

A. Yes.

Q. Would you tell us from about what years, from when to when?

A. Well, I been working there for about 20 or 24 or 26 years, different boats.

Q. Now, were you working there in 1946?

[fol. 631] A. Yes, sir.

Q. And you worked from 1946 up until when?

A. Until April of '58.

Q. Were you a captain?

A. Yes, sir.

Q. From when?

A. '46.

Q. From '46 on?

A. Yes.

Q. Captain on boats from '46 to '58?

A. Yes.

Q. Prior to '46, what were you?

A. I was captain and crew.

Q. And crewman?

A. Yes, sir.

Q. Did you leave the DeJean Packing Co.?

A. Yes.

Q. Would you tell us why you left?

A. I figured I would try something else for a while.

Q. Didn't you have some difficulty—physical difficulty?

A. Yes, sir. I left there and went and had surgery done at Marine Hospital, and then I went to work at Pascagoula.

Q. Is that why you left originally, because you had to have the operation?

[fol. 632] A. Not exactly.

Q. Now, during the times that you worked there, Mr. Smith, had you noticed a sign on the rear shed of the company?

A. Yes.

Q. Do you remember what that sign said?

A. Well, I couldn't tell you all the words, but I know the first few lines said, "Notice to all fishermen, that if there's no freight boat with ice around, take the shrimp to the dock."

Q. During the time you worked on these boats, Mr. Smith, did you find there were certain limitations or restrictions on certain things?

A. Yes, sir, they was.

Q. Was there any kind of limitation as to barrels of shrimp?

A. Yes, sir, certain amount of barrels of shrimp and on the ice also.

Q. Limitations on the ice?

A. Yes.

Q. Where did you get the ice?

A. At the company dock, from Biloxi Freezing Company.

Q. While you were at dockside, did you ever get the ice any place else?

A. No, sir.

Q. Always there. And how did you find out that there [fol. 633] was a limitation?

A. They'd either tell us from the factory, and when we'd call for the ice they'd tell us what the limit on ice was.

Q. How did you find out about the shrimp?

A. They'd let us know before we left the wharf.

Q. Who would tell you that?

A. One of the bosses, either Mr. Williams or Mr. Hall.

Q. Tell you there was a limitation on the number of barrels of shrimp?

A. Yes, sir.

Q. Did you buy groceries occasionally for the boat?

A. Yes.

Q. Where did you get those?

A. At the company store, Hall's Grocery.

Q. When you were dockside, did you ever get groceries any place else?

A. No, sir.

Q. Now, you didn't hear the testimony of the others, but did you have any limitations on the things you could buy at the grocery store?

A. At times there was stuff we couldn't get on the groceries.

Q. What kind of stuff?

A. Stuff like cigarettes and stuff like that. They stopped that one time, but it didn't last very long.

[fol. 634] Q. Did you usually get, while you were captain, gear or equipment for the boat?

A. Yes, sir.

Q. Where did you generally get that?

A. Generally go to the trawl shop and find out if they had it. If they didn't have it there, they would give us a purchase order and tell us to go to the hardware.

Q. This trawl shop was the one at the DeJean Company?

A. Yes, sir.

Q. Did you just go in and take anything you wanted?

A. No, sir.

Q. What did you have to do to get it?

A. We would have to find out if they had it if we could get it.

Q. Now, sometimes the weather gets bad on the Gulf Coast.

A. It does.

Q. What do you do about the boats in that situation? Do you just let the boats sit there and get broken up?

A. No. When there's a storm warning up, they'll let us know, either call us or send word for us to go take the boats up in the harbor.

Q. Who calls you up?

A. One of the bosses, Mr. Williams or Mr. Hall, or somebody calls us up and notifies us to take the boats up [fol. 635] the river.

Q. Now, Mr. Smith, you worked for this company a long time. Do you remember the hurricane of 1947?

A. I do.

Q. Did you have any part in reconstructing the property after that hurricane?

A. Yes, sir.

Q. Did you get paid for it?

A. Yes, sir.

Q. How about painting the superstructure of the vessel? Did you ever do that?

A. Yes, sir.

Q. Did you do that pretty regularly?

A. At least once a year.

Q. At least once a year?

A. Yes, sir.

Q. During the time you were on these trawlers, did you take the catch any place you wanted, or what did you usually do with it?

A. No, sir, we generally bring them to the dock, to the company dock.

Q. Did you have occasions when you unloaded at Mavar?

A. Yes, sir.

Q. Tell us about that.

A. The reason they sent us over there, they never had [fol. 636] enough to raise steam up, and I think Mavar had work at the present time and they told us to go on over there.

Q. Did you just go over to Mavar yourself?

A. No, they told us to.

Q. They told you to go over there. Now, during the winter months when you can go either oystering or shrimp-ing, do you decide what you are going to do or the company?

A. Not exactly. They let us know. If they like us to go dredging they will ask you to go dredging. If they want you to, say, shrimp, they will—

Q. Captain, did you receive any bonus during the years you were there?

A. I did.

Q. Did you ever pay any severance tax to the State of Louisiana?

A. No, sir.

Q. Did you ever pay any license fees?

A. No.

Q. Any permits of any kind?

A. No.

Q. Did you ever file a partnership return with the United States?

A. No, sir.

[fol. 637] By Mr. Nickman: You may inquire.

Cross-examination.

By Mr. Morse:

Q. You quit there being a captain of a boat because you couldn't make a living?

A. Not exactly. I thought I'd try something else.

Q. You thought you'd try something else, but I mean you were not doing so good at fishing, shrimping?

A. That's right.

Q. And you hadn't done so good at oystering, had you?

A. That's right.

Q. And after you quit down there and when you said you had an operation, you borrowed a thousand dollars from Peck Williams?

A. That's right. That's personal.

Q. That's personal. And Peck is better known as Carroll E. Williams?

A. That's right.

Q. Did you know you were working on a boat that Mr. Elmer Williams gave you for the Williams Packing & Navigation Company?

A. If I knew what?

Q. That you were working on a boat turned over to you by Elmer Williams for the Williams Packing & Navigation Company?

[fol. 638] A. That's right.

Q. And when you got the check, whenever you would make a *ctach*, you would make a distribution; in other words, cash the check and give the crew members what was coming to them?

A. That's right.

Q. When you left there, you hadn't paid for the rig, and your boat was indebted to the company for the rig and some other things?

A. I couldn't tell you if it was in debt or not. I left the rig on there.

Q. You left the rig on?

A. Yes, sir.

Q. Captain, whenever you got a boat you would decide how to rig it, you and the crew members?

A. That's right.

Q. And what equipment you wanted to put on there?

A. That's right.

Q. Some men used bigger trawls and some used smaller trawls.

A. That's right.

Q. And some used trawls that would fish for shrimp around Pass a Loutre?

A. That's right.

Q. And those trawls were different from the trawls you [fol. 639] fish out here in the Gulf?

A. Some of 'em were.

Q. I mean, they would have to be equipped with mud ropes?

A. That's right.

Q. And those mud ropes were used down in Pass a Loutre?

A. Yes, sir.

A. Yes, sir.

Q. The boat you had, one of the boats, was the Robert B. Favret?

A. That's right.

Q. When you decided to go oystering, what boat did you get?

A. The Jerry O'Keefe.

Q. And why?

A. I thought I would try dredging a while.

Q. Was the Jerry O'Keefe equipped for dredging oysters at that time?

A. Yea.

Q. And the Robert B. Favret wasn't?

A. That's right.

Q. And you and the crew members got the Jerry O'Keefe and went oystering?

A. That's right.

Q. When was that?

A. I think it was '57.

Q. You can write, can't you?

[fol. 640] A. A little bit, yes, sir.

Q. Look at that signature under "Jerry O'Keefe" and tell the Court what that is.

A. Captain Ferdinand Smith.

Q. Was that signed by you?

A. Yea, sir.

Q. Was that signed by you before Mr. Frieberger, a notary public, if you recall? Look down here. (indicating) At any rate, was that given to you before you went oystering?

A. I really couldn't tell you.

By Mr. Morse: He has identified it by his signature, and we want to offer it in evidence as an exhibit to his testimony.

By Mr. Nickman: We object to it, largely because of the date. It is beyond the tax years, and Your Honor has ruled relative to the matter of those leases that were offered. This is after litigation, after the tax years of the suit. There is no offer that any of these were signed prior.

By Mr. Morse: I'll get to that later, Mr. Nickman. I have to put Mr. Frieberger back on, and we'll do it.

By Mr. Nickman: We feel if counsel is allowed to develop matters of post tax years, the Government believes [fol. 641] they should be free to do the same, and we have other matters that we could offer, after tax years, that we have excluded.

By the Court: Yes, I sustain the objection.

By Mr. Morse: In response to what he brought out, I want to make this statement, that it was in response to what he brought out about his fishing for oysters on the occasion that he did, which was in '57, January of '57, when he traded the Robert Favret for the Jerry O'Keefe. Is that correct, Mr. Smith?

By the Witness: That's right.

By the Court: I sustain the objection to the introduction of the document. You may let it be marked and made a part of the record, but I sustain the ground.

By Mr. Morse: I'd like for Mr. Nickman to state—I've been trying to get him to do it all the way through—the years '53, '54 and '55. He got into the other years with Mr. Smith and I have no objection to it.

By the Court: I have ruled upon objections as they arose,

and I will let the record stand as it is already made and sustain the objection to the introduction of this document.

By Mr. Morse: That will be agreeable with us.

By Mr. Nickman: I might parenthetically say this document purports to be a document of the Williams Packing & Navigation Company, and Your Honor gave us access to all those records but this was never disclosed to the Government before. That is an additional objection.

By Mr. Morse: I might state in answer to that, that we did not know until last Monday morning when you were going to shadow the fishing industry in Louisiana and Mississippi in a secret hearing that we were going to be required to produce these documents.

By the Court: Very well. Now then, both of you remain quiet until the reporter marks the exhibit.

(Same received in evidence and marked Plaintiff's Exhibit No. 38, which exhibit is copied here below.)

PLAINTIFF'S EXHIBIT No. 38

Williams Packing & Navigation Co., Inc.
Biloxi, Mississippi

Unlawful Removal of Oysters or Signs from Leased Propagating Grounds; Instructions to Captain and Crew of Vessels; Penalty

Section 439. no person shall knowingly or wilfully take, carry away, or attempt to take or carry away, without permission of the lessee, any oysters, shells, or clutch from the water bottoms of the Gulf of Mexico or the lakes, bays, inlets, lagoons, rivers, bayous, or other waters tributary thereto or connecting therewith, within the jurisdiction of [fol. 643] the state where the bottoms are, at the time of such taking, let or leased to any person under the laws of Louisiana, for the purpose of bedding, planting, propagating, or cultivating oysters.

No person shall knowingly or wilfully remove, break off, destroy, or otherwise injure or alter any stake, monument, bounds, buoy, sign, or other designation or bedding or propagating ground placed thereon by the lessee, or know-

ingly or willfully move from any bedding ground any stake, monument, bounds, buoy, sign, mark, or other designation placed thereon by the department.

All owners or employers of vessels engaged in the oyster industry in this state shall issue printed instructions to the captains and crews in charge of the vessels, calling attention to the provisions of this Section, duly executed before a competent notary by the parties interested, the original to be kept by the department and duplicate to be had in possession at all times by the captain of the vessel and shall be shown on demand of any officer or agent of the department. Lack of possession of such document on a vessel, or a refusal to show the same, is prima facie evidence that the paper does not exist.

Whoever violates any of the provisions of this Section shall be punished as provided in R. S. 56:445. The imposition of the penalties does not bar the prosecution and conviction of the wrongdoer under the criminal statutes of this state.

[fol. 644] (Source: Acts 1932, No. 67,:18.)

Date January 15, 1957.

Boat Jerry O'Keefe.

Captain /s/ Ferdinand Smith.

Subscribed and sworn to before me this 15th day of January 1957.

(Notary Public or officer authorized to administer oaths).

Seal. .

/s/ Lucius Freiburger,

My Commission Expires May 11, 1959. Seal.

Continuing:

Q. You called the Hall's Grocery Store "the company store." You don't know who owns that store, do you, Mr. Smith?

A. Well, not exactly, but I think when they first put it up it was put up by the company.

Q. I'm not asking you what you think. I'm asking what you know.

A. I couldn't tell you.

Q. Mr. Leon Hall here ran it for a number of years?

A. Yes, sir, and he—

Q. —and his brother is running it now?

A. Yes.

Q. And your brother-in-law worked in there in the meat department?

[fol. 645-710] A. Yes.

Q. When was that?

A. After it was opened.

Q. After it was opened in 1946?

A. That's right.

Redirect examination.

By Mr. Nickman:

Q. I think you said you went to the second grade?

A. That's right.

Q. Tell us honestly, do you understand the meaning of this?

A. Some I does, but some of them I don't.

Q. Was it explained to you by anybody?

A. No, sir.

By Mr. Nickman: No further questions.

By Mr. Morse: No further questions.

(Witness excused.)

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[fol. 711] IN THE UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND
OPINION OF THE COURT—July 3, 1959

This is a controversy between the *Williams Packing & Navigation Co., Inc.*, and *J. L. Enochs*, District Director of the Internal Revenue and arises as a result of a determination of the Commissioner of Internal Revenue that the persons upon whose compensation the taxes involved were assessed were employees of the plaintiff within the meaning of the Federal Insurance Contributions Act and

the Federal Unemployment Tax Act. An Assessment was made by the director against the plaintiff for the years 1953, 1954 and 1955 in the total sum of \$41,568.57. The main question posed for solution is whether or not the captains and crewmen who performed fishing services aboard trawlers of which the plaintiff was the owner or the lessee, were employees within the meaning of Sections 1426 and 1607 of the Internal Revenue Code of 1939, and Sections 3121 and 3306 of the Internal Revenue Code of 1954. If the relationship of employer-employee existed, then the tax was properly assessed. If the relationship of employer-employee did not exist, then the levy was unlawful.

The corporation leases boats to a captain who employs his own crew and each captain has complete control over [fol. 712] the boat and crew and no right of control is reserved by the corporation. The captain and crew determine when they shall depart for fishing waters and where to go. The catch is returned and sold, and the proceeds are divided up by the captain after one share is deducted for the boat.

This case, like so many other cases, depends upon the individual facts as brought out here and not upon methods of other similar concerns engaged in like business. No uniform pattern covering the entire United States can be formulated except where the facts are identically the same. The judgment to be rendered in this case must be determined from the facts of this particular case, including all the exhibits and reasonable inferences therefrom and the conduct of the parties so far as it may have probative force upon the issues. The law must be determined from the Acts of Congress, the judicial interpretations by the courts and the Treasury Regulations insofar as the Treasury Regulations are made within the scope of the powers granted to it by Congress.

The record is a lengthy one and there are some conflicts in the testimony, but on the whole the testimony is practically undisputed as to the manner in which the plaintiff conducts its business. The plaintiff, Williams Packing & Navigation Co., Inc., is a Louisiana corporation and was organized in June of 1944 and granted a charter by the [fol. 713] State of Louisiana and is qualified to do business

in Mississippi. Elmer Williams, Carroll Williams, Jr., and Lucius Frieberger, citizens of Mississippi, were the incorporators, with Elmer Williams, president, owning nineteen shares, Carroll Williams, Jr., secretary-treasurer, nineteen shares, and Lucius Frieberger two shares. The purpose of the corporation was to engage in the seafood packing business, to own, operate, lease, manage and control boats, machinery, appliances and tackle for the purpose of engaging in the fishing operations, fishing for, dredging and catching oysters, shrimp, crabs and other species of fish.

It has operated under its charter continuously from year to year since the date of its incorporation and is a bona fide corporation existing under the laws of the State of Louisiana. It was not organized for the purpose of evading the payment of any taxes of any type and at the time of its incorporation, as well as now and continuously since its incorporation, was to engage in a legitimate business, which it has done. If it were to operate for oysters in the waters of the State of Louisiana it was necessary and imperative that it incorporate in that state, insofar as oysters were concerned. Other than catching shrimp, oysters and other fish in the State of Louisiana, its principal place of business is at Biloxi, Mississippi. In the conduct of its business it leased the greater part of the [fol. 714] time from the DeJean Packing Company, a partnership, some eighteen or twenty shrimp trawlers, and in March, 1952 bought from the DeJean Packing Company two additional fishing vessels which were built by the DeJean Shipyard Company in Biloxi. These two vessels were resold in 1957 to the DeJean Packing Company.

Elmer Williams, the president of the corporation, is the General Manager, including business manager and looking after the details of carrying on the work, particularly within the past few years. Carroll Williams, Jr., at the time of the trial of the lawsuit, was in bad health and had been for several years, but participated in the discussions frequently with Elmer as to the methods of carrying on the business. Lucius Frieberger was and is the bookkeeper and attends to the major part of the office details of the business. A fairly accurate set of books is kept on behalf of the corporation, but because of the

nature of the business not such a set of books as could be characterized as a full and complete set of records. Among other things that Frieberger keeps is an account of the trip expenses for each boat and the catch made by each boat. He handles the financing and banking details of the corporation, issues the checks to the captains of the boats after having computed how much is due for a catch and turns the check over to the captain, who cashes it and [fol. 715] pays off the men employed by the captain to assist him in the operation of the boat.

It has been the custom on the Coast of Mississippi since the seafood packing industry started that fishing vessels have operated upon a share or lay basis, but the details of this customary way varied between some of the packers and that is the reason that it is necessary to determine how the corporation in this particular case conducted its business.

This corporation retained no control over the captain or his men after a vessel had been let to a captain upon his application for *about* or to one selected by Elmer Williams and picked by him to operate the boat. There was no fixed time usually for which a boat would be let to a captain. Occasionally it would be for a trip, but usually and customarily for a season. Elmer Williams, the president, the record shows, knew practically all of the fishermen along the Coast of Mississippi and knew the capable and competent ones to whom he safely could entrust a boat owned by the corporation or leased by it and they would reach an agreement by which the boat would be let to the captain for either trips or for the season. The corporation, acting through Elmer Williams, reserved no right of control over the captain, but leased or let the boat to the captain with the distinct understanding that the captain would hire all of his men or helpers and could fire them without [fol. 716] any right whatsoever on the part of *the corporation* to hire or fire any of the employees of the captain. The transaction partook very much of the nature of a contract. The corporation could not fire the captain, but if the captain were guilty of a breach of a contract, just as in any other contractual relationship, the inference is from the testimony that the corporation could then require the captain to return the boat because of a breach

of contract, but not because of any retained right of control over the captain.

When the captain takes possession of the boat he takes the papers to the office of the Bureau of Customs, where he obtains the necessary statutory endorsement on the papers as captain of that boat. Then it is that the captain employs the number of fishermen necessary to complete the crew as may be determined by the captain; in the industry here on the Coast the crew is usually two for shrimping and four for dredging oysters. A voyage may last from ten days to two weeks, depending upon the weather and the type of seafood for which they are looking. The boat and crew are then completely under the supervision and control of the captain, who leaves port when he desires, fishes where he pleases and returns when he pleases. The captain procures the fuel, groceries and ice, and determines for himself the amount that will be needed for his voyage. The captain may purchase his fuel and [fol. 717] groceries wherever he desires, but usually purchases his fuel at the DeJean docks and his groceries at the grocery store of Leon Hall. Leon Hall is the son-in-law of Elmer Williams and operates successfully a grocery store.

The testimony shows that the captains of these boats purchased a great part of their groceries during the years involved from Leon Hall, but not because he is a son-in-law of Elmer Williams; it is because of his efficiency and accommodation in delivering groceries to the boats, rather than having the captain and crew go to a grocery store to purchase their own groceries and make delivery themselves. Leon Hall charges groceries to the account of the boat captain or to the boat, makes deliveries, and if he does not have the groceries in his own store, will send out and get them. He is conveniently located to the boats and it easily can be seen why the captains patronize a store of this type. Their patronage is not due to any coercion whatsoever upon the part of Elmer Williams or of the corporation. The captains usually obtain their equipment from the DeJean Packing Company and their ice from the Biloxi Freezing Company. The ice blocks, which are delivered to the docks for loading, are reduced to size for boat use by an ice crusher located at the DeJean docks. Elmer Williams is a partner in the DeJean Packing Com-

pany and is vice-president and a stockholder in the Biloxi Freezing Company and, while an uneducated man, yet he [fol. 718] he is a successful business man, very energetic and accommodating. It is because of the convenience and accommodation that the captains of the various boats have in this set-up that they patronize these other industries or businesses in which Elmer Williams is interested. It is not because of any reserved control, right of control or coercion on the part of the corporation or Elmer Williams.

As hereinabove stated, the purpose and business of the corporation is to catch and sell seafoods with boats either owned by them or leased by them. The captains usually sell their output or catch to the DeJean Packing Company, but there is no requirement that they so do. They are at liberty, if they can get a better price than offered by DeJean, to sell their catch when and where they please. When one of these boats comes in with a catch it usually docks at the DeJean docks where the catch is sold, and if sold to DeJean, the catch is unloaded on a conveyor system at the docks and on this conveyor system ultimately is weighed and then moved into the processing operations of DeJean Packing Company, DeJean Packing Company being engaged in the processing of seafood. A record is made of the weight of the catch, given to the captain, who takes it to Lucius Friberger, who totals up and calculates the amount of money the catch represents. Friberger adds [fol. 719] up the trip expenses, including the fuel, groceries and ice, etc., and then these expenses are deducted from the value of the gross catch and the net cash is divided between the captain and his crew, one share going to each, one share going to the boat (generally known as the boat share), and one share goes for the rig until the rig is paid for. The check is made payable to the captain, who makes the distribution.

There is another feature shown by the record to the effect that if a trip is unsuccessful it is generally called a broker, and means that no catch was made where the value of the catch is sufficient to cover the cost of the trip. Under these circumstances the unpaid cost of *the trip* is carried forward to succeeding trips to be deducted from subsequent catches before any subsequent disbursements are made to the fishermen on these subsequent catches.

It occurs occasionally under these circumstances that the corporation may advance money to the fishermen out of its own general fund with the expectation of being repaid. This is no requirement by the terms of the contract, but simply a gratuity on the part of the corporation, I would say, in order to maintain the good will of the fishermen. If one of the fishermen on such a broker is not employed again by a captain, then the corporation simply loses that amount of money.

The defendant introduced in evidence certain hospital [fol. 720] records of the Marine Hospital at New Orleans, which contained statements made by the corporation against interest, and possibly it brought out other statements against interest. Likewise, the plaintiff points to the conduct of the Government in indicting the Fishermen's Union, charging that they were not employees, and in that case, in the prosecution of the indictment, contended and urged that the fishermen were not employees. These statements against interest are admissible in evidence and competent to the issues, and in this case were considered by the court along with all the other evidence in reaching a judgment herein. However, statements against interest made by a party are not conclusive, but are only to be considered as a part of the evidence, along with all the other facts in the case, and after so being considered, it is then the duty of the court to determine the actual facts. See C. J. S. Vol. 31, pp. 1161 to 1164, Secs. 377, 378 and 379.

The investigation of the Internal Revenue Service was commenced in March, 1956 and on July 17, 1956 formal notice was given to the corporation and demand made for the payment of the taxes. On September 5, 1957, the corporation filed this suit seeking permanently to enjoin the collection of the tax on the ground that it was illegally assessed and that to be required to pay that large amount of money would wreck and ruin the corporation, and were [fol. 721] such unusual circumstances because of its illegality and the inability of the corporation to pay, that an injunction was warranted, notwithstanding Section 7421(a) of the Internal Revenue Code of 1954, which provides that no injunction shall issue restraining the assessment or collection of a tax. As a matter of law, it is a rare case where an injunction will issue, but where the tax is illegal and there

exists some unusual and extraordinary circumstance, then it is appropriate to grant injunctive relief. The corporation has always assumed that it was not liable for taxes of this nature for the reason that the relationship of employer and employee did not exist, and prior thereto no contention by the Government had been made to it. It alleged that being suddenly called upon to pay \$41,568.57 was more than it could do. I find as a fact that if the levy had been made upon the assets of the corporation it would have wrecked the corporation and thrown it into bankruptcy, as it did not have and does not have assets with which to pay the taxes and not sufficient assets with which it could have negotiated a loan to pay the tax.

It was the theory, and is the theory, of the Government that the DeJean Packing Company is able to pay the tax and that because of the relationship of Elmer Williams to the corporation and to the partnership that the corporation had it within its power to require the DeJean Packing Company [fol. 722] to pay the tax for it if the corporation be liable. However, as heretofore stated, this contention is not sustained by the evidence. The record clearly shows that the DeJean Packing Company is completely a separate and independent entity from that of the corporation and the DeJean Packing Company is under no duty or requirement of law to pay the tax for the corporation. It is a partnership composed of Elmer Williams and his wife, and Carroll Williams and his wife.

The corporation is engaged only in production of raw materials and sells practically all of its product to the DeJean Packing Company. At the time of the filing of the suit it owned two vessels worth approximately twenty-one or twenty-two thousand dollars, and its only assets of any value were the leasehold interest it had upon boats and the good will and value of its right to fish in the waters of Louisiana. The balance sheet of the corporation shortly before the suit was filed showed that it had a deficit of approximately \$300.00, and the record shows that from time to time there were overdrafts and on other occasions where it had a fairly good bank account, but not sufficient to pay the sum of \$41,568.57 in a lump sum, and, as before stated, if the Government had been permitted to execute upon the property and seize and sell it, it would totally wreck and ruin

the corporation. The corporation is entitled to continue its [fol. 723] existence because its charter has value and gives it valuable rights in Louisiana, and as long as it complies with all the federal laws it should not be permitted to be destroyed.

The burden of proof, of course, is upon the corporation to show that it was an unusual hardship to be required to pay an illegal tax, and in this case it has so shown by the burden of proof that to pay the illegal tax would put it out of business.

The Government complains of bad faith on the part of the plaintiff and concealment of evidence. The court finds as a fact that the plaintiff was not guilty of any bad faith or any intentional concealment of any records or evidence. The record does show that some of the documents requested by the Government and ordered to be furnished by the court were not delivered within the time directed by the court; but it was due to the inability of the plaintiff to locate these documents,—not to intentional conduct on the part of the plaintiff,—and when they were located they were furnished to the defendant and the court gave the defendant ample opportunity for full examination of all documents they desired to look at.

I find as a fact that the relationship of employer and employee as defined by the Social Security Act did not exist and does not exist between the corporation and the captains of the boats and the crewmen, and that the tax was illegally and unlawfully levied, and that to have permitted the director to proceed to levy upon the property of the corporation would have destroyed the business of the corporation and completely wrecked it and worked an unusual and extraordinary hardship upon the corporation, and under these circumstances the temporary injunction was properly issued and should be permanent.

Counsel for plaintiff and defendant have filed elaborate briefs, which have been very helpful to the court and which have cited many authorities, but it will not be necessary to refer to each particular authority cited by the respective parties and to do so would unduly prolong this opinion.

The law is well settled that if a tax has been levied and demanded that is illegal and the alleged taxpayer cannot pay it without undue hardship and that the circumstances

are unusual, he then is entitled to an injunction. See *Midwest Haulers v. Brady*, 128 Fed. 2d 496; *John M. Hirst & Co. v. Gentsch*, 133 Fed. 2d 247. It is well settled that under ordinary circumstances an injunction will not issue, but that an alleged taxpayer who disputes the liability of the tax must pay it and sue for recovery of it. This principle needs no citation nor authority. Likewise, hardship placed upon an alleged taxpayer does not justify the issuance of an injunction. See *Rheams v. Vrooman-Fehn Printing Co.*, 140 Fed. 2d 237. On the other hand, where it is shown that the [fol. 725] tax is illegal and that there are exceptional and extraordinary circumstances, then it is appropriate to grant an injunction. See *Miller v. Nut Margarine Co.*, 284 U. S. 498; *U. S. v. Curd*, 257 Fed. 2d 347. See also *U. S. Mutual Benefit Co. v. Welch*, Sixth Circuit, not yet reported.

I therefore conclude as a matter of law that it was appropriate to grant the temporary injunction.

Having found as a fact that the relationship of employer-employee did not exist, it is not necessary to determine what the relationship of the parties really is, but apparently, insofar as the corporation and the captains are concerned, it is the relationship of lessor and lessee or joint adventurers, as was claimed by the Government in the *Gulf Coast Shrimpers & Oystermen's Association, et al v. United States*, 236 Fed. 2d 658, or that of independent contractors. The crewmen were employed by the captain, or joint adventurers with him. It is not necessary to discuss all the authorities that have been cited by the plaintiff and the defendant touching upon the relationship of the parties. It is sufficient to cite the cases of *Bartels v. Birmingham*, 332 U. S. 126; *U. S. v. Silk and Harrison* v. *Greyvan Lines*, 331 U. S. 704; and *Gulf Coast Shrimpers & Oystermen's Association, et al v. U. S.*, 236 Fed. 2d 658 (Fifth Circuit), and the authorities that were cited by the court in these decisions.

[fol. 726] I shall not undertake to differentiate all the cases cited by the defendant and relied upon by him, but simply call attention to the fact that each particular case is governed by its own facts. The case of *Maryland Casualty Co., et al v. Grant*, 146 S.E. Rep. 792, a Georgia case, is easily distinguishable from the facts in the instant case. To a certain point the facts are the same, but at the crucial

point the facts are different. In that case the canning company reserved the right to fire the captain operating the boat at any time it desired and without cause, and giving a liberal construction to the Workmen's Compensation Act of Georgia, the court held that the captain was an employee of the canning company rather than an independent contractor. *Southern Shell Fish Company v. Plaisance*, 196 Fed. Rep. 2d 312, is a case wherein the court held that it was properly submitted to the jury to determine an issue of fact as to whether the plaintiff in that case was an employee of the Southern Shell Fish Company or of the vessel's captain as an independent contractor of the vessel, and that the record showed that there was evidence that would support either theory. In that case there also was an additional circumstance of insurance coverage, which is a circumstance to be taken into consideration in determining whether the relationship of employer-employee exists or that of an independent contractor. See *Finkbine [fol. 727] Lumber Co., v. Cunningham*, 57 Sou. Rep. 916 (Miss.).

These examples of the authorities simply illustrate the point that each case will be determined by the facts of the particular case and that no general pattern can be established or formulated. The record in the *Gulf Coast Shrimpers & Oystermen's Association* case, *supra*, well demonstrates that fact and the fact that all the packers on the Coast of Mississippi do not have identical patterns. In that case it was shown by one of the packers that he paid Social Security on his employees and retained sufficient control over the operations of the captains as would make them employees. On the whole, however, as shown in that case, the relationship of employer-employee does not exist and it was so contended by the Government in the case. While the Government is not estopped by taking a contrary position, yet the contention of the Government at that time is very persuasive, and the judgment of the court and the opinion of the Supreme Court denying certiorari establishes that the relationship of employer-employee did not exist. The court, during the trial, declined to submit the issue to the jury and in the absence of the jury agreed with the contention of the Government and found as a fact that the relationship of employer-employee did not exist and stated

that if it did exist, then the defendants would be entitled [fol. 728] to a directed verdict, but declined and refused instructions requested by the defendants to submit it to the jury. This action of the trial court was affirmed.

It is not necessary to give the history of the present act of Congress, but suffice it to say that the act as it finally came out of the Congress defined an employee to mean "any individual who under the usual common law rules applicable in determining the employer-employee relationship has the status of an employee." It is, therefore, clear that Congress adopted the definition of an employee to be that as understood under the common law realistically applied, in determining whether the relationship of employer-employee existed. The various cases construing the act prior to 1948 were discussed in the report of Senator Milliken from the Committee on finance, and Congress finally adopted the definition above quoted.

Applying the common law rule, it is clear in this case as a matter of law that the relationship of employer-employee does not exist between a corporation engaged in the business that the plaintiff is and the captains of the boats as shown in this particular record. No one criterion can be announced that will define and determine that relationship, but the right of control is one of the important [fol. 729] elements. In determining what the common law is, the decisions of the federal courts rather than of the various states must be looked to in order to determine what it is. Treasury Regulation 107, Sec. 403. 2045 recognized this doctrine. The Treasury Regulations have the force of law where they are within the perimeter of the Acts of Congress. If they exceed the authority granted by Congress, then, of course, they are without weight.

The defendant in this case contends that the corporation in this case is a sham and a shell and that its corporate existence and charter may be entirely disregarded, and cites the case of *Gregory v. Helvering*, 293 U. S. 465; *Higgins v. Smith*, 308 U. S. 437. Under the facts of the present case those authorities are not applicable, but, on the other hand, the facts of the present case bring it within the doctrine of *Moline Properties v. Commissioner*, 319 U. S. 436, and as announced in that case the corporation is one that was

organized for a legitimate purpose and authorized by applicable law.

I conclude as a matter of law that the tax was illegally assessed and that the granting of the injunction was appropriate and that the injunction should be made perpetual.

An order may be drawn in accord herewith.

This, the 3rd day of July, 1959.

/s/ S. C. Mine, United States District Judge.

[fol. 730] IN THE UNITED STATES DISTRICT COURT

FINAL DECREE—July 14, 1959

This cause having heretofore come on for hearing on complaint, answer, oral and documentary proof, and briefs having been submitted by counsel for both parties, and the court being fully advised in the premises is of the opinion that the temporary injunction heretofore issued in this cause should be made permanent, and the court having on July 3, 1959, in its opinion, made findings of fact and conclusions of law, which by reference are made a part of this final decree, it is accordingly

Ordered, Adjudged and Decreed, that the defendant herein, J. L. Enochs, District Director of Internal Revenue, his officers, agents or employees be and they are hereby permanently enjoined from collecting an assessment made against the plaintiff for the years 1953, 1954 and 1955, in the total sum of \$41,368.57, together with interest thereon, under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act.

Ordered, Adjudged and Decreed, this 14th day of July, 1959.

/s/ S. C. Mine, United States District Judge.

Approved as to form:

— — Attorneys for Plaintiff.

[fols. 731-734] /s/ Approved subject to deletion of 3rd paragraph as to concerning of tax lien.

/s/ E. R. Holmes, Asst. U. S. Atty

Attorneys for Defendant

Order Book 1959, Pages 220-221.

[fols. 735-755] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 756] **IN THE UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT**

No. 18272

**J. L. ENOCHS, District Director of Internal Revenue,
Appellant,**

versus

WILLIAMS PACKING & NAVIGATION CO., INC., Appellee.

**Appeal from the United States District Court for the
Southern District of Mississippi.**

OPINION—June 14, 1961

Before Rives, Cameron and Jones, Circuit Judges.

Cameron, Circuit Judge: This appeal presents two questions: whether fishermen carrying on their occupation of catching shrimp and oysters aboard trawlers, owned or leased by Williams Packing & Navigation Company, Inc., taxpayer-appellee, were its employees during the taxable periods involved within the meaning of §§ 1426 and 1607 [fol. 757] of the Internal Revenue Code of 1939 and §§ 3121 and 3306 of the Internal Revenue Code of 1954; and whether taxpayer has shown the existence of such extraordinary and unusual circumstances as to warrant the granting of an injunction notwithstanding the prohibitions contained in § 7421(a) of the 1954 Code.

The district court held that each of the questions should be answered in favor of the taxpayer and, after full hearing, denied the Director's claim of \$41,568.57, plus statutory interest, assessed against it as Federal Insurance Contributions and Federal Unemployment Taxes for taxable periods in the years 1953, 1954 and 1955. Its action was taken after an extended hearing, at which it considered the oral testimony of eighteen witnesses and the depositions of three, along with a large number of exhibits the originals of which are before us; and it entered detailed findings of fact and conclusions of law occupying some twenty pages in the record. Its written opinion is reported in 176 F. Supp. pp. 168 et seq.

The opinion was based upon the evidence heard by the court and the consideration of written briefs filed by the parties. It deals in detail with the contentions made by the appellant Director, and we are of the opinion that the findings of fact of the court below, brought forward in part in the opinion, are supported by substantial evidence in the record and that its conclusions of law are sound; and, on the basis of the court's findings and opinion and the brief comments which follow, we affirm the judgment of the court below.

[fol. 758] The published opinion deals with all of the questions argued before us,¹ and the trial court's handling the issues is so clear and complete that we feel that an extended opinion by us is not called for.

A careful reading of the Director's brief shows that the question underlying disposition of the whole case, that is,

¹ Appellant asserts that the court below erred in the following respects:

1. In holding that the relationship of employer-employee did not exist between the taxpayer and the fishermen (boat captains and crew members).
2. In holding that taxpayer had no right of control over the fishermen.
3. In holding that the taxes assessed were illegal.
4. In holding that collection of the taxes would "totally wreck and ruin the corporation."
5. In holding that collection of the taxes should be enjoined."

whether the fishermen were employees of the taxpayer corporation, was one essentially to be resolved from the facts as developed from the large number of witnesses the court heard.²

A few excerpts from the court's published opinion will illustrate the accurate grasp which the court below had of the problems before it and the law under which they would be resolved:

"This case, like so many other cases, depends upon the individual facts as brought out here and not upon methods of other similar concerns engaged in like business. No uniform pattern covering the entire United States can be formulated except where the facts are identically the same. The judgment to be rendered in this case must be determined from the facts of this particular case, including all the exhibits and reasonable inferences therefrom and the conduct of the parties so far as it may have probative force upon the issues. The law must be determined from the Acts of Congress, the judicial interpretations by the courts and the Treasury Regulations . . .

"It has been the custom on the Coast of Mississippi since the seafood packing industry started that fishing vessels have operated upon a share or lay basis, but the details of this customary way varied between some of the packers and that is the reason that it is necessary to determine how the corporation in this particular case conducted its business. . . . These examples of the authorities simply illustrate the point that each case will be determined by the facts of the particular

² The Director's contentions with respect to this question embrace these propositions: ". . . The fishermen were subject to taxpayer's right of control, and control was actually exercised; the employee relationship is evidenced by taxpayer's right to discharge the boat captains and crew members; the method of remuneration is not inconsistent with an employer-employee relationship; the parties treated their relationship as that of employer-employee; a realistic application of the common law control test requires the conclusion that the fishermen were employees, rather than independent contractors . . ."

case and that no general pattern can be established or formulated. The record in the Gulf Coast Shrimpers and Oystermans Association case, *supra* [5 Cir., 236 F. 2d 658], well demonstrates that fact and the fact that all packers on the Coast of Mississippi do not have identical patterns. . . ."³

[fol. 760] The careful analysis of the testimony and application of the cases the Government relied on before the Court below and now relies on before us demonstrate that it fully comprehended the issues of fact involved and the law applicable to them. The conclusion reached by the

³ The accuracy of these statements of the trial judge is illustrated by recent decisions rendered by the National Labor Relations Board which have been called to our attention. We refer to six decisions and Orders by the Labor Board based upon its published decision and *F. Alioto Co.*, 129 N.L.R.B. No. 6, where, under circumstances similar to those existing in this case, the Labor Board held that the employees on shrimp boats were not employees of the company owning the boats, but of the captains who leased them:

Case No. 23-RC-1542, *Independent Fish Co., Inc.*, Employer, and *General Drivers' Etc., Union*, Petitioner, Order entered Oct. 5, 1960;

Case No. 23-RC-1538, *Doro Besteiro*, Employer, and *General Drivers and Helpers Local Union No. 657*, decided Oct. 6, 1960;

Case No. 23-RC-1550, *Sea Garden Corporation*, Employer, and *General Drivers and Helpers Local Union No. 657, etc.*, decided Oct. 5, 1960;

Case No. 23-RC-1549, *Wilhelm Seafoods, Inc., et al.* Employers, and *General Drivers and Helpers Union No. 657*, decided Oct. 5, 1960;

Case No. 25-RC-1539, *Roberto deLuna*, Employer, and *General Drivers and Helpers Local Union No. 657*, decided Oct. 5, 1960.

These decisions have no decisive effect in this case, but serve merely to attest the fact that agencies of the Government are resolving similar issues in a way which is consonant with the trial court's decision here.

trial court from the testimony is entitled to the presumption of correctness with which the Federal Rules invest it.

The Director argues earnestly that the injunction was not properly granted in this case. His contention is thus summarized—*each of the two points relating to the action of the court below in deciding a fact issue:*

“In ruling that the injunction was properly granted, it (the trial court) held, erroneously, (1) that the tax was ‘illegal’ because the employer-employee relationship did not exist between the taxpayer-corporation and the fishermen, and (2) that to allow the Director to proceed to levy would have brought financial disaster to the taxpayer. . . .

[fol. 761] “As this Court said in *United States v. Curd*, 257 F.2d 347, 350, the issuance of any such injunction must be tested in the light of the ‘emphatic language’ of the statute and the ‘limited circumstances’ in which, under equitable principles reflected in *Miller v. Nut Margarine Co.*, 284 U. S. 498, and cases following it, injunctive relief may be granted despite the statutory prohibition. . . .

“... Basically, the error of the court below lies in its failure to realize that the taxpayer-corporation and the DeJean partnership, though separate legal entities, were parts of an integrated operation and for all practical purposes, including financial, were merged.” [Emphasis added.]

Appellant quotes from the *Curd* case (pp. 350-351) our estimate of the “extraordinary circumstances” which would meet the stringent requirements necessary to support the conclusion that “irretrievable injustice would be done were an injunction not issued.” The opinion of the court below shows that the judge carefully considered the authorities relied upon by the Government and others and concluded “as a matter of law that it was appropriate to grant the temporary injunction,” and to make it permanent.

Dealing with the relationship between DeJean and the taxpayer, which the Director referred to as basic, and with what the Director characterized as error leading to the

wrongful issuance of the injunction, the court below in its opinion said:

[fol. 762] "It . . . is the theory, of the Government that the DeJean Packing Company is able to pay the tax and that because of the relationship of Elmer Williams to the corporation and to the partnership that the corporation had it within its power to require the DeJean Packing Company to pay the tax for it if the corporation be liable. However, as heretofore stated, this contention is not sustained by the evidence. . . ."

Large portions of the evidence in the record and of the Director's brief deal with this relationship, which appellee charged to have encompassed fraudulent transactions and concealments in the dealings between the appellee corporation and the partnership in an effort to escape the exactions here involved. The witnesses, who detailed the circumstances from which an intelligent conclusion as to such a relationship would have to be drawn, were local people, doubtless well known to the judge. He heard them testify and he set forth fully in his findings and the opinion the nature and ingredients of that relationship as he found them to be. The inferences he drew and the conclusion he reached from the human testimony, the exhibits, and the evidence of customs given by the witnesses included the weighing and assaying of testimony involving subtleties and intangibles which could best be done by one having the "feel" of the case which was possessed by the district judge. The Director's evidence was sharply contradicted, and the trial court doubtless considered that major reliance was placed by the Director on the testimony of one or more witnesses who were embittered by the events attending a [fol. 763] strike against appellee. Its decision on this fact question is invested with the presumption of correctness, which an examination of the record does not tempt us to set aside as clearly erroneous.

The trial court's decision on this fact question, treated by appellant throughout as being basic, virtually disposes of the claim that the injunction was not properly granted. Appellant did argue briefly that appellee was able to pay the exaction and sue for refund, relying to a considerable extent on the testimony of strongly biased witnesses to sus-

tain this contention. The trial court's findings⁴ are against appellant and they are clearly supported by the evidence.

This Court has been diligent in protecting the public revenues against improvident injunctions. The last case coming to our attention is *McDonald v. Phinney, Director*, 1961, 285 F.2d 121. There we affirmed the action of a district judge in refusing to make permanent a temporary injunction which had been issued and in dismissing the complaint under § 7421. In that case the tax involved had been reduced to judgment in the Tax Court on the basis of stipulation between the parties and, more than a year and a half later, the taxpayer filed his action for injunction on the ground that "he lacked sufficient funds to pay the sum [fol. 764] alleged to be owing to the government and that to allow the government to collect such sums would be to subject his property to a forced sale by reason of which he would suffer irreparable damage."

In that case, we set forth a good summary of the applicable rule (page 122):

"We think that the trial court acted properly in dismissing the complaint. Section 7421 clearly prohibits suits to restrain assessment or collection of taxes except in certain cases not relevant to the present inquiry. While it is true that, notwithstanding the statutory prohibition against such suits, they have been allowed under certain circumstances, see, e.g., *Miller v. Standard Nut Margarine Co.*, 284 U. S. 498, 52 S. Ct. 260, 76 L. Ed. 422, they are not permitted when the complaining party asserts *financial hardship and nothing or little more*. *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663; *Lloyd v. Patterson*, 5 Cir., 242

"I find as a fact that if the levy had been made upon the assets of the corporation it would have wrecked the corporation and thrown it into bankruptcy, as it did not have and does not have assets with which to pay the taxes and not sufficient assets with which it could have negotiated a loan to pay the tax. . . .

"The Government complains of bad faith on the part of the plaintiff and concealment of evidence. The court finds as a fact that the plaintiff was not guilty of any bad faith or any intentional concealment of any records or evidence."

F.2d 742; *Enochs v. Green*, 5 Cir., 270 F.2d 558; *Robique v. Lambert*, D. C., 114 F. Supp. 305, affirmed per curiam 5 Cir., 214 F.2d 3. We think it clear that the facts involved in the instant case necessitate its falling into the latter class of cases, for appellant has failed to show the extraordinary circumstances which would justify the issuance of an injunction by the district court. See *United States v. Curd*, 5 Cir., 257 F.2d 347; *Tomlinson v. Poller*, 5 Cir., 220 F.2d 308, and *Darnell v. Tomlinson*, 5 Cir., 220 F.2d 894." [Emphasis added.]

[fol. 765] The circumstances relied upon in that and the cases cited by it fall far short of those found to be present here. The trial court said here, in addition to that quoted *supra*: "As before stated, if the Government had been permitted to execute upon the property and seize and sell it, it would totally wreck and ruin the corporation. The corporation is entitled to continue its existence *because its charter has value and gives it valuable rights in Louisiana*, and as long as it complies with all the federal laws it should not be permitted to be destroyed." [Emphasis added.]

A peculiar equity existing in appellee's favor—which the Government does not dispute except on the ground that the facts did not support the court's finding—arises from the effort of the Director to enforce taxes against the corporation by coercion of its stockholders to pay the corporation's supposed indebtedness. The Director did not assess the tax against the stockholders or the partnership, but confined his effort to an attempt to reach the assets of those not made parties to the assessment or brought into this action, by this indirect proceeding aimed at collecting the money from those held by the court not to be liable for it.

We do not find any case decided by the Supreme Court or by this Court denying injunctive relief under facts approximating those justifiably found by the trial court as present in this case. All of the tests and requirements of *Miller v. Standard Nut Margarine Co.*, *supra*, were met by the proof and the findings of the court; and we think, moreover, that the injunction was justified under *Allen, Collector of Internal Revenue v. Regents of the University System of Georgia*, 1938, 304 U. S. 439, where it is said, at pages 448-449: "The dispute as to the propriety

of a suit in equity must be resolved in the light of the nature of the controversy. . . . These extraordinary circumstances we think justify resort to equity. What we have said indicates that R.S. 3224, *supra* [now § 7421], does not oust the jurisdiction. The statute is inapplicable in exceptional cases where there is no plain, adequate, and complete remedy at law. This is such a case, for here the assessment is not of a tax payable by respondent but of a penalty for failure to collect it from another." The facts here bring this case closely in line with that case, as well as *Hill v. Wallace*, 1922, 259 U.S. 44, 62; *Dodge v. Brady*, 1916, 240 U.S. 122; and *Lassoff v. Gray*, 6 Cir., 1959, 266 F.2d 745, and the cases therein listed at page 746.

Based upon the published opinion of the court below, supplemented by these comments, the judgment appealed from is

Affirmed.

Rives, Circuit Judge, Dissenting:

This suit seems to me one to restrain the collection of a tax clearly prohibited by Section 7421 (a) of the 1954 Internal Revenue Code.¹ Admittedly, the suit does not [fol. 767] fall within the express exceptions which relate to insufficiency of the notice of deficiency provided in Sections 6212 (a) and (c), and 6213 (a). Under familiar rules of construction, the statute having provided express exceptions to its prohibition, it would seem that implied exceptions are excluded. However, both the learned district judge and the majority of this Court feel that implied exceptions are provided by *Miller v. Standard Nut Margarine Company*, 1932, 284 U.S. 498, and that this suit falls within such exceptions. With deference, I disagree on both scores.

The courts have been prohibited from entertaining suits for the purpose of restraining the assessment or collection

¹"§ 7421. *Prohibition of suits to restrain assessment or collection*

"(a) *Tax*.—Except as provided in sections 6212 (a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." 26 U.S.C.A. § 7421.

of any tax since 1867.² The rationale and philosophy of that prohibition was first clearly stated in *Cheatham, et al. v. United States*, 1875, 92 U.S. 85, 89:

"If there existed in the courts, State or National, any general power of impeding or controlling the collection of taxes, or relieving the hardship incident to taxation, the very existence of the government might be placed in the power of a hostile judiciary. *Dows v. The City of Chicago*, 11 Wall. 108. While a free course of remonstrance and appeal is allowed within the departments before the money is finally exacted, the general government has wisely made the payment of the tax claimed, whether of customs or of internal revenue, a condition precedent to a resort to the courts by the party against whom the tax is assessed. In the internal- [fol. 768] revenue branch it has further prescribed that no such suit shall be brought until the remedy by appeal has been tried; and, if brought after this, it must be within six months after the decision on the appeal. We regard this as a condition on which alone the government consents to litigate the lawfulness of the original tax. It is not a hard condition. Few governments have conceded such a right on any condition. If the compliance with this condition requires the party aggrieved to pay the money, he must do it. He cannot, after the decision is rendered against him, protract the time within which he can contest that decision in the courts by his own delay in paying the money. It is essential to the honor and orderly conduct of the government that its taxes should be promptly paid, and drawbacks speedily adjusted; and the rule prescribed in this class of cases is neither arbitrary nor unreasonable."

Since then that reasoning has been often repeated.³ If a fair and adequate administrative remedy is provided, due process does not require an opportunity for judicial

² March 2, 1867, c. 169, § 10, 14 Stat. 475.

³ E.g., *Graham v. duPont*, 1923, 262 U.S. 234, 254, 255, and the cases there cited.

review of tax liability⁴. The suit in the present case was filed only after the Appellate Division had "carefully considered your claims for abatement of employment taxes as listed below and the information furnished by your representatives," and had "concluded that there is no overassessment of employment taxes." While the result is questioned, [fol. 769] there has been no contention or holding that such review does not constitute a fair and adequate administrative remedy.

Properly interpreted, *Miller v. Standard Nut Margarine Company, supra*, is not an attempt of the judiciary to emasculate by implied exceptions the clear and explicit prohibition of jurisdiction contained in the statute. The theory of that case is that the exaction was not a true tax, but simply an "attempted exaction by a tax official under the guise of an assessed tax." That theory was thus stated by Judge Walker for this Court,⁵ and was explicitly adopted by the Supreme Court:

"And this court likewise recognizes the rule that, in cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collector." (Emphasis supplied.)

Miller v. Standard Nut Margarine Company, 1932, 284 U.S. 498, 509.

That *Miller v. Standard Nut Margarine Company* presented such an exceptional case as to amount to an abuse of jurisdiction by the tax officials is made apparent in the extended and able analysis of that case in *Homan Mfg. Co. v. Long*, 7 Cir., 1957, 242 F.2d 645, 651-653. In no other case has the Supreme Court permitted an injunction to restrain the assessment or collection of a tax. The cases [fol. 770] are collected and discussed in 9 Mertens Law of Federal Income Taxation, Zimet Revision, Section 49.212, where it is stated:

⁴ *Anniston Manufacturing Co. v. Davis*, 1937, 301 U.S. 337, 342, 343.

⁵ *Miller v. Standard Nut Margarine Co.*, 3 Cir., 1931, 49 F.2d 79, 84.

"With just one exception, those cases in which the Supreme Court has permitted injunctions restraining Government officials were all cases in which the Court held that the purported tax sought to be restrained was in reality not a tax but a penalty, and the Court said that the statutory prohibition did not apply to the collection of penalties. The decision in *Miller v. Standard Nut Margarine Company* is the only case in which the Supreme Court clearly held that although no penalty was involved, the circumstances were so special and extraordinary as to render inapplicable the statute prohibiting the maintenance of a suit to restrain the collection of taxes."

The rationale of *Miller v. Standard Nut Margarine Company*, *supra*, cannot be extended to bring within some supposedly implied exception cases like the present one without emasculating the prohibition contained in the statute. That much was recognized by Judge Sanborn, speaking for the Eighth Circuit, in a case which seems to me directly in conflict with the holding of the majority in the instant case:

"It is true that where a complainant demonstrates that what purports to be a tax is merely an exaction in the guise of a tax and that there are special and extraordinary circumstances which bring the case under some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collection of the [fol. 771] pseudo-tax. *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 509, 52 S.Ct. 260, 76 L.Ed. 422. The validity of the taxing act under which the assessments against appellant were made has been sustained. *Steward Machine Co. v. Davis*, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279, 109 A.L.R. 1293; *Helvering v. Davis*, 301 U.S. 619, 57 S.Ct. 904, 81 L.Ed. 1307, 109 A.L.R. 1319. The assessments are for taxes, and not for exactions in the guise of taxes. The appellant may not owe them, but that does not change their nature, nor is nonliability a special or extraordinary circumstance. This case presents the ordinary situation of a taxpayer resisting payment of taxes which he believes that he does not owe. That the appellant is in poor financial condition, that it will be a hardship upon him to pay the

taxes and sue for their recovery, that to compel him to pay them threatens ultimate ruin to his business, and that a court of Iowa has ruled that appellant was not an employer of the drivers of his cars and was not liable for contributions under the Iowa Unemployment Compensation Law, Chap. 77.2, Code of Iowa, 1939, § 1551.07, et seq., we do not regard as 'special and extraordinary circumstances'⁶ which would justify the maintenance of this action to enjoin the collection of these taxes."

Kaus v. Huston, 8 Cir., 1941, 120 F.2d 183, 185. See also, *Homan Mfg. Co. v. Long*, 7 Cir., 1959, 264 F.2d 158, 160.

In the present case, the taxes are not attacked as themselves unconstitutional or illegal, nor is any question raised [fol. 772] as to the good faith of the tax officials in assessing the taxes against the plaintiff. Instead, the question is closely and hotly litigated purely as a question of fact, thus stated by the district court:

"The main question posed for solution is whether or not the captains and crewmen who performed fishing services aboard trawlers of which the plaintiff was the owner or the lessee, were employees within the meaning of Sections 1426 and 1607 of the Internal Revenue Code of 1939, 26 U.S.C.A. §§ 1426, 1607, and Sections 3121 and 3306 of the Internal Revenue Code of 1954, 26 U.S.C.A. §§ 3121, 3306. If the relationship of employer-employee existed then the tax was properly assessed. If the relationship of employer-employee did not exist, then the levy was unlawful."

Williams Packing & Navigation Co. v. Enochs, S.D. Miss., 1959, 176 F.Supp. 168, 170.

This is a more extreme application of *Miller v. Standard Nut Margarine Company*, *supra*, than has ever before been countenanced by this Circuit.⁶ Very clearly, I submit, this case is not one of an illegal exaction in the guise of a tax.

⁶ See for example, *United States v. Cund*, 5 Cir., 1958, 257 F.2d 347, 350; *Enochs v. Green*, 5 Cir., 1959, 270 F.2d 558, 561; *McDonald v. Phinney*, 5 Cir., 1961, 285 F.2d 121, 122.

Just as clearly, the case is not brought within the second requisite of the rule, viz., "special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence." *Miller v. Standard Nut Margarine Company, supra*, 284 U.S. at 509. Equity may enjoin vexatious litigation not brought in good faith but instituted for annoyance and oppression. 43 C.J.S., Injunctions, Sec. 39; 28 Am.Jur., Injunctions, Sec. 210. I know of no case, however, permitting an injunction merely upon the basis of financial hardship, and so to do would be an obvious unequal application of the law to the poor and to the rich.

Further, under the facts and circumstances of this case, the taxpayer should not be permitted to establish irreparable damages by hiding behind the corporate fiction, when for all practical purposes, including financial, the taxpayer corporation and the De Jean partnership were parts of an integrated operation under the control and direction of the same two individuals. *Southern Pacific Co. v. Lowe*, 1918, 247 U.S. 330.

I therefore respectfully dissent.

[fol. 774]

No. 18272

J. L. ENOCHS, District Director of Internal Revenue

versus

WILLIAMS PACKING & NAVIGATION CO., INC.

JUDGMENT—June 14, 1961

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

"Rives, Circuit Judge, Dissenting."

[fol. 775] Clerk's Certificate to Foregoing Transcript
(Omitted in Printing.)

[fol. 776] SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF
CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 12, 1961.

Earl Warren, Chief Justice of the United States.

Dated this 11th day of September, 1961.

[fol. 777] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 11, 1961.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. —

**J. L. ENOCHS, DISTRICT DIRECTOR OF INTERNAL
REVENUE, PETITIONER**

v.

WILLIAMS PACKING & NAVIGATION CO., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the District Director of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the District Court (Appendix B, *infra*, pp. 28-42) is reported at 176 F. Supp. 168. The opinion of the Court of Appeals (Appendix A, *infra*, pp. 11-26) is reported at 291 F. 2d 402.

JURISDICTION

The judgment of the Court of Appeals was entered on June 14, 1961. (Appendix A, *infra*, p. 27). By order of the Chief Justice on September 11, 1961, the

time for filing a petition for certiorari was extended to October 12, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the District Court, in light of the prohibition of Section 7421(a) of the 1954 Internal Revenue Code, had jurisdiction permanently to enjoin the District Director from collecting the social security and unemployment taxes involved, where there was no showing that the taxes were illegal exactions within the meaning of this Court's decision in *Miller v. Nut Margarine Co.*, 284 U.S. 498.

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C., 1958 ed.):

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax*.—Except as provided in sections 6212 (a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

STATEMENT

This case originated upon the filing of a complaint (R. 2-8) by the Williams Packing & Navigation Co., Inc. (taxpayer) for an injunction to restrain the District Director of Internal Revenue, Mississippi, from collecting social security and unemployment taxes in

the total amount of \$41,568.57, which had been assessed against it for taxable periods during the years 1953, 1954 and 1955. (R. 10-11.) The assessments resulted from the determination of the Commissioner of Internal Revenue that the captains and crewmen who performed services as fishermen aboard trawlers which were owned or leased by the taxpayer were employees of the taxpayer within the meaning of the term "employee" as defined in Sections 1426 and 1607 of the Internal Revenue Code of 1939, and the corresponding provisions (Sections 3121 and 3306) of the Internal Revenue Code of 1954.

The district court granted a permanent injunction (R. 729, 730) upon its finding that (Appendix B, *infra*, p. 36):

if the levy had been made upon the assets of the corporation it would have wrecked the corporation and thrown it into bankruptcy, as it did not have and does not have assets with which to pay the taxes and not sufficient assets with which it could have negotiated a loan to pay the tax

and upon its further finding and legal conclusion that there was no employer-employee relationship between taxpayer and the captains and crews of the ships involved (Appendix B, *infra*, p. 38).

The Court of Appeals affirmed (Appendix A, *infra*, p. 20). Judge Rives, dissenting, noted that the holding of the majority was in direct conflict with an Eighth Circuit decision and pointed out (App. A, *infra*, p. 24) that the rationale of this Court's decision in *Miller*

v. *Nut Margarine Co.*, 284 U.S. 498, "cannot be extended to bring within some supposedly implied exception cases like the present one without emasculating the prohibition" against injunctions to restrain the collection of taxes imposed by Section 7421(a) of the Internal Revenue Code.

REASONS FOR GRANTING THE WRIT

The decision of the Fifth Circuit renders ineffectual the broad statutory prohibition of suits "for the purpose of restraining the assessment or collection of any tax" 26 U.S.C. 7421(a). It is inconsistent with the decision of this Court in *Miller v. Nut Margarine Co.*, 284 U.S. 498, which narrowly limited the field of exceptions to the parallel provisions of an earlier statute,¹ and it threatens to create a substantial area of disorder in the administration of the revenue acts. Finally, the case is in direct conflict with the Eighth Circuit's decisions in *Kaus v. Huston*, 120 F. 2d 183, and *Missouri Valley Intercollegiate Athletic Ass'n v. Bookwalter*, 276 F. 2d 365, and conflicts in principle with the Seventh Circuit's decisions in *Mensik v. Long*, 261 F. 2d 45, and *Homan Mfg. Co. v. Long*, 242 F. 2d 645.

Section 7421(a) of the Internal Revenue Code of 1954 commands in the clearest words that Congress could choose that "no suit for the purpose of restraining the assessment or collection of any tax

¹ R.S. 3224, the predecessor to present Section 7421(a).

shall be maintained in any court."² Embodied in this sweeping prohibition is the congressional judgment that the complexities of administration of the revenue laws are manageable only if there is a uniform system of review of asserted tax liabilities. The cardinal principle of this uniform system for almost a century has been the general rule expressed by Section 7421(a)—that the government may assess and collect a contested tax and the taxpayer's remedy, if he believes assessment and collection were improper, is to bring an action for recovery of the payment.³

Where Congress thought it necessary to limit this general rule, it provided an explicit exception to the clear statutory command. Section 7421 itself refers to an exception for timely petitions to the Tax Court.

² This provision first became part of the federal tax system in 1867. Section 10 of the Act of March 2, 1867, c. 169, 14 Stat. 471, 475, amended Section 19 of the Act of July 13, 1866, c. 184, 14 Stat. 152, by the addition of the phrase "And no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court." Section 19 set forth the conditions under which suits might be maintained for the refund of taxes alleged to have been erroneously assessed. In the Revised Statutes the phrase added in 1867 was modified slightly and became Section 3224: "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Section 3653(a) of the 1939 Code and Section 7421(a) of the 1954 Code are identical to that section except for the addition of provisions relating to cases pending before the Tax Court, not germane here.

³ See *Cheatham v. United States*, 92 U.S. 85, 89; *State Railroad Tax Cases*, 92 U.S. 575, 613; *Snyder v. Marks*, 109 U.S. 189, 192, 193.

Except in cases where the Secretary of the Treasury or his delegates believes that assessment or collection of a deficiency will be jeopardized by delay,* no assessment or collection of a deficiency in an income, estate, or gift tax is to be made until after there is a final decision of the Tax Court upon any timely petition for redetermination that may have been filed by the taxpayer.* Thus, in the case of these taxes, Congress created a statutory right to a judicial determination of liability prior to payment. In the case of social security and unemployment taxes, however, Congress made no exception to the right of the government to collect the tax before any issue of liability should be adjudicated. Thus, Section 7421 applies with full force to bar any "suit for the purpose of restraining the assessment or collection of any tax."

In addition to the explicit statutory exception for Tax Court proceedings, this Court, in *Miller v. Nut Margarine Co.*, *supra*, recognized another narrowly limited occasion for suits restraining the assessment or collection of a tax.* The Court, finding the government's determination of tax liability "arbitrary and capricious," stated that a "valid oleomargarine tax could by no legal possibility have been assessed," and therefore concluded that enforcement of the Act

* See Section 6861.

* Section 6213.

* Justices Brandeis and Stone dissented on the ground that the broad prohibition of the statute "has been consistently applied as precluding relief, whatever the equities alleged." 284 U.S. at 511.

would be "arbitrary and oppressive." On the basis of these findings of what the Seventh Circuit has described as "administrative caprice"—plus a showing of "special and extraordinary circumstances sufficient to bring the case within some acknowledged field of equity jurisprudence"—the Supreme Court affirmed the granting of equitable relief despite Section 7421.

In the present case the Fifth Circuit has decided that in the presence of equitable considerations the assessment and collection of a tax can be enjoined whenever a tax liability is erroneously asserted, whether or not the assertion is, in any other sense, "illegal." There is no basis for a finding of administrative caprice or of an arbitrary and oppressive assertion of tax liability where none could possibly lie. The record and issues in the present case pose questions of law and fact which could be decided only after a full trial, which are subject to reasonable disagreement, and which indisputably were argued by the government in complete good faith. The effect of the decision below is, therefore, to reverse the rule of payment prior to suit and to substitute a right to a

¹ 284 U.S. at 508, 510. The facts in the *Nut Margarine* case showed that the attempt to collect the tax was in defiance of three district court adjudications determining that the product involved was not taxable; that a Treasury Decision had declared the product nontaxable; that the taxpayer had been advised by the Commissioner that its product would not be taxable; and that no effort was being made to impose a similar tax upon identical products being marketed in the same area.

² *Homan Mfg. Co. v. Long*, 242 F. 2d 645, 653.

³ 284 U.S. at 509.

complete judicial determination of tax liability prior to payment, whenever the taxpayer makes a showing of hardship.

It is the government's position that the *Nut Margarine* exception to Section 7421 is limited to situations where the assessment is capricious and arbitrary. If the exception is stretched to include all bona fide contests as to liability, Section 7421(a) is without rational content. The Eighth Circuit has adopted this position in a decision in direct conflict with the decision of the court below. In *Kaus v. Huston*, 120 F. 2d 183, the taxpayer contended, as in the present case, that social security and unemployment taxes could not be legally assessed against him for he was only the lessor of taxicabs to independent operators and not the employer of the drivers. The Collector of Internal Revenue argued, as in the present case, that considering the full factual context of the relation between the taxpayer and the drivers, the taxpayer was the employer of the drivers within the meaning of the tax provisions. The Eighth Circuit denied injunctive relief on the ground that (120 F. 2d at 185):

The assessments are for taxes, and not for exactions in the guise of taxes. The appellant may not owe them, but that does not change their nature, nor is nonliability a special or extraordinary circumstance. This case presents the ordinary situation of a taxpayer resisting payment of taxes which he believes that he does not owe. * * *

* The Eighth Circuit has more recently reaffirmed its position in *Missouri Valley Intercollegiate Athletic Ass'n v. Bookwalter*, 276 F. 2d 365 (withholding and social security taxes).

For the same reason, the Seventh Circuit has also denied injunctive relief in *Mensik v. Long*, 261 F. 2d 45, and *Homan Mfg. Co. v. Long*, 242 F. 2d 645.

This conflict among the circuits involves a frequently recurring question of law which only the Supreme Court can finally resolve.¹¹ Certiorari should be granted for this purpose as well as to reestablish that uniformity of procedure for contesting bona fide assertions of tax liability which is the clear intent of Section 7421(a) and this Court's *Nut Margarine* decision.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ARCHIBALD COX,
Solicitor General.

JOHN B. JONES, Jr.,
Acting Assistant Attorney General.

MEYER ROTHWACKS,
GEORGE F. LYNCH,
Attorneys.

OCTOBER 1961.

¹¹ Five other injunction suits involving the same issue on the merits as in the present case are pending in the Southern District of Mississippi alone. *De Jean Packing Co. v. Enochs*, No. 2116; *Taltavull Shrimp & Oyster Co. v. Enochs*, No. 2695; *Mavar Shrimp & Oyster Co. v. Enochs*, No. 1952; *Victory Packing Co. v. Enochs*, No. 2820; *C. C. Co. v. Enochs*, No. 2069.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18272

**J. L. ENOCHS, DISTRICT DIRECTOR OF INTERNAL REVENUE,
APPELLANT, v. WILLIAMS PACKING & NAVIGATION CO.,
INC., APPELLEE**

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI**

(June 14, 1961)

Before RIVES, CAMERON AND JONES, Circuit Judges.

CAMERON, Circuit Judge: This appeal presents two questions: whether fishermen carrying on their occupation of catching shrimp and oysters aboard trawlers, owned or leased by Williams Packing & Navigation Company, Inc., taxpayer-appellee, were its employees during the taxable periods involved within the meaning of §§ 1426 and 1607 of the Internal Revenue Code of 1939 and §§ 3121 and 3306 of the Internal Revenue Code of 1954; and whether taxpayer has shown the existence of such extraordinary and unusual circumstances as to warrant the granting of an injunction notwithstanding the prohibitions contained in § 7421(a) of the 1954 Code.

The district court held that each of the questions should be answered in favor of the taxpayer and, after full hearing, denied the Director's claim of \$41,568.57, plus statutory interest, assessed against it as Federal

Insurance Contributions and Federal Unemployment Taxes for taxable periods in the years 1953, 1954 and 1955. Its action was taken after an extended hearing, at which it considered the oral testimony of eighteen witnesses and the depositions of three, along with a large number of exhibits the originals of which are before us; and it entered detailed findings of fact and conclusions of law occupying some twenty pages in the record. Its written opinion is reported in 176 F. Supp. pp. 168 et seq.

The opinion was based upon the evidence heard by the court and the consideration of written briefs filed by the parties. It deals in detail with the contentions made by the appellant Director, and we are of the opinion that the findings of fact of the court below, brought forward in part in the opinion, are supported by substantial evidence in the record and that its conclusions of law are sound; and, on the basis of the court's findings and opinion and the brief comments which follow, we affirm the judgment of the court below.

The published opinion deals with all of the questions argued before us,¹ and the trial court's handling of the issues is so clear and complete that we feel that an extended opinion by us is not called for.

¹ "Appellant asserts that the court below erred in the following respects:

1. In holding that the relationship of employer-employee did not exist between the taxpayer and the fishermen (boat captains and crew members).
2. In holding that taxpayer had no right of control over the fishermen.
3. In holding that the taxes assessed were illegal.
4. In holding that collection of the taxes would 'totally wreck and ruin the corporation.'
5. In holding that collection of the taxes should be enjoined."

A careful reading of the Director's brief shows that the question underlying disposition of the whole case, that is, whether the fishermen were employees of the taxpayer corporation, was one essentially to be resolved from the facts as developed from the large number of witnesses the court heard.²

A few excerpts from the court's published opinion will illustrate the accurate grasp which the court below had of the problems before it and the law under which they would be resolved:

"This case, like so many other cases, depends upon the individual facts as brought out here and not upon methods of other similar concerns engaged in like business. No uniform pattern covering the entire United States can be formulated except where the facts are identically the same. The judgment to be rendered in this case must be determined from the facts of this particular case, including all the exhibits and reasonable inferences therefrom and the conduct of the parties so far as it may have probative force upon the issues. The law must be determined from the Acts of Congress, the judicial interpretations by the courts and the Treasury Regulations * * *"

"It has been the custom on the Coast of Mississippi since the seafood packing industry started that fishing vessels have operated upon a share or lay basis, but the details of this customary way varied between some of the packers and that is the reason that it is necessary

² The Director's contentions with respect to this question embrace these propositions: " * * * The fishermen were subject to taxpayer's right of control, and control was actually exercised; the employee relationship is evidenced by taxpayer's right to discharge the boat captains and crew members; the method of remuneration is not inconsistent with an employer-employee relationship; the parties treated their relationship as that of employer-employee; a realistic application of the common law control test requires the conclusion that the fishermen were employees, rather than independent contractors * * *"

to determine how the corporation in this particular case conducted its business. . . .

"These examples of the authorities simply illustrate the point that each case will be determined by the facts of the particular case and that no general pattern can be established or formulated. The record in the Gulf Coast Shrimpers and Oystermans Association case, *supra* [5 Cir., 236 F. 2d 605], well demonstrates that fact and the fact that all packers on the Coast of Mississippi do not have identical patterns. . . ."

*The accuracy of these statements of the trial judge is illustrated by recent decisions rendered by the National Labor Relations Board which have been called to our attention. We refer to six decisions and Orders by the Labor Board based upon its published decision and *F. Aliote Co.*, 129 N.L.R.B. No. 6, where, under circumstances similar to those existing in this case, the Labor Board held that the employees on shrimp boats were not employees of the company owning the boats, but of the captains who leased them:

Case No. 22-EC-1542, *Independent Fish Co., Inc., Employer, and General Drivers' Etc., Union*, Petitioner, Order entered Oct. 5, 1960;

Case No. 22-EC-1533, *Doro Basteiro, Employer, and General Drivers and Helpers Local Union No. 657*, decided Oct. 6, 1960;

Case No. 22-EC-1550, *Sea Garden Corporation, Employer, and General Drivers and Helpers Local Union No. 657, etc.*, decided Oct. 5, 1960;

Case No. 22-EC-1549, *Wilhelm Seafoods, Inc., et al., Employers, and General Drivers and Helpers Union No. 657*, decided Oct. 5, 1960;

Case No. 22-EC-1559, *Roberto deLuna, Employer, and General Drivers and Helpers Local Union No. 657*, decided Oct. 5, 1960.

These decisions have no decisive effect in this case, but serve merely to attest the fact that agencies of the Government are resolving similar issues in a way which is consonant with the trial court's decision here.

The careful analysis of the testimony and application of the cases the Government relied on before the Court below and now relies on before us demonstrate that it fully comprehended the issues of fact involved and the law applicable to them. The conclusion reached by the trial court from the testimony is entitled to the presumption of correctness with which the Federal Rules invest it.

The Director argues earnestly that the injunction was not properly granted in this case. His contention is thus summarized—each of the two points relating to the action of the court below in deciding a fact issue:

"In ruling that the injunction was properly granted, it (the trial court) held, erroneously, (1) that the tax was 'illegal' because the employer-employee relationship did not exist between the taxpayer-corporation and the fishermen, and (2) that to allow the Director to proceed to levy would have brought financial disaster to the taxpayer. . . .

"As this Court said in *United States v. Curd*, 257 F. 2d 347, 350, the issuance of any such injunction must be tested in the light of the 'emphatic language' of the statute and the 'limited circumstances' in which, under equitable principles reflected in *Miller v. Nat Margarine Co.*, 284 U.S. 498, and cases following it, injunctive relief may be granted despite the statutory prohibition. . . .

" . . . Basically, the error of the court below lies in its failure to realize that the taxpayer-corporation and the DeJean partnership, though separate legal entities, were parts of an integrated operation and for all practical purposes, including financial, were merged." [Emphasis added.]

Appellant quotes from the *Curd* case (pp. 350-351) our estimate of the "extraordinary circumstances" which would meet the stringent requirements necessary to support the conclusion that "irretrievable injustice would be done were an injunction not issued." The opinion of the court below shows that the judge carefully considered the authorities relied upon by the Government and others and concluded "as a matter of law that it was appropriate to grant the temporary injunction," and to make it permanent.

Dealing with the relationship between DeJean and the taxpayer, which the Director referred to as basic, and with what the Director characterized as error leading to the wrongful issuance of the injunction, the court below in its opinion said:

"It * * * is the theory, of the Government that the DeJean Packing Company is able to pay the tax and that because of the relationship of Elmer Williams to the corporation and to the partnership that the corporation had it within its power to require the DeJean Packing Company to pay the tax for it if the corporation be liable. However, as heretofore stated, this contention is not sustained by the evidence. * * *"

Large portions of the evidence in the record and of the Director's brief deal with this relationship, which appellee charged to have encompassed fraudulent transactions and concealments in the dealings between the appellee corporation and the partnership in an effort to escape the exactions here involved. The witnesses, who detailed the circumstances from which an intelligent conclusion as to such a relationship would have to be drawn, were local people, doubtless well known to the judge. He heard them testify and he set forth fully in his findings and the opinion the nature and ingredients of that relationship as he

found them to be. The inferences he drew and the conclusion he reached from the human testimony, the exhibits, and the evidence of customs given by the witnesses included the weighing and assaying of testimony involving subtleties and intangibles which could best be done by one having the "feel" of the case which was possessed by the district judge. The Director's evidence was sharply contradicted, and the trial court doubtless considered that major reliance was placed by the Director on the testimony of one or more witnesses who were embittered by the events attending a strike against appellee. Its decision on this fact question is invested with the presumption of correctness, which an examination of the record does not tempt us to set aside as clearly erroneous.

The trial court's decision on this fact question, treated by appellant throughout as being basic, virtually disposes of the claim that the injunction was not properly granted. Appellant did argue briefly that appellee was able to pay the exaction and sue for refund, relying to a considerable extent on the testimony of strongly biased witnesses to sustain this contention. The trial court's findings are against appellant and they are clearly supported by the evidence.

"I find as a fact that if the levy had been made upon the assets of the corporation it would have wrecked the corporation and thrown it into bankruptcy, as it did not have and does not have assets with which to pay the taxes and not sufficient assets with which it could have negotiated a loan to pay the tax. . . ."

"The Government complains of bad faith on the part of the plaintiff and concealment of evidence. The court finds as a fact that the plaintiff was not guilty of any bad faith or any intentional concealment of any records or evidence."

This Court has been diligent in protecting the public revenues against improvident injunctions. The last case coming to our attention is *McDonald v. Phinney, Director*, 1961, 285 F. 2d 121. There we affirmed the action of a district judge in refusing to make permanent a temporary injunction which had been issued and in dismissing the complaint under § 7421. In that case the tax involved had been reduced to judgment in the Tax Court on the basis of stipulation between the parties and, more than a year and a half later, the taxpayer filed his action for injunction on the ground that "he lacked sufficient funds to pay the sum alleged to be owing to the government and that to allow the government to collect such sums would be to subject his property to a forced sale by reason of which he would suffer irreparable damage."

In that case, we set forth a good summary of the applicable rule (page 122):

"We think that the trial court acted properly in dismissing the complaint. Section 7421 clearly prohibits suits to restrain assessment or collection of taxes except in certain cases not relevant to the present inquiry. While it is true that, notwithstanding the statutory prohibition against such suits, they have been allowed under certain circumstances, see, e.g., *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 52 S. Ct. 260, 76 L. Ed. 422, they are not permitted when the complaining party asserts *financial hardship and nothing or little more*. *State Railroad Tax Cases*, 92 U.S. 575, 23 L. Ed. 663; *Lloyd v. Patterson*, 5 Cir., 242 F. 2d 742; *Enochs v. Green*, 5 Cir. 270 F. 2d 558; *Robique v. Lambert*, D.C., 114 F. Supp. 305, affirmed per curiam 5 Cir., 214 F. 2d 3. We think it clear that the facts involved in the instant case necessitate its falling into the latter class of cases, for appellant has failed to show

the extraordinary circumstances which would justify the issuance of an injunction by the district court. See *United States v. Curd*, 5 Cir., 257 F. 2d 347; *Tomlinson v. Poller*, 5 Cir., 220 F. 2d 308, and *Darnell v. Thomlinson*, 5 Cir., 220 F. 2d 894." [Emphasis added.]

The circumstances relied upon in that case and the cases cited by it fall far short of those found to be present here. The trial court said here, in addition to that quoted *supra*: "As before stated, if the Government had been permitted to execute upon the property and seize and sell it, it would totally wreck and ruin the corporation. The corporation is entitled to continue its existence *because its charter has value and gives it valuable rights in Louisiana*, and as long as it complies with all federal laws it should not be permitted to be destroyed." [Emphasis added.]

A peculiar equity existing in appellee's favor—which the Government does not dispute except on the ground that the facts did not support the court's findings—arises from the effort of the Director to enforce taxes against the corporation by coercion of its stockholders to pay the corporation's supposed indebtedness. The Director did not assess the tax against the stockholders or the partnership, but confined his effort to an attempt to reach the assets of those not made parties to the assessment or brought into this action, by this indirect proceeding aimed at collecting the money from those held by the court not to be liable for it.

We do not find any case decided by the Supreme Court or by this Court denying injunctive relief under facts approximating those justifiably found by the trial court as present in this case. All of the tests requirements of *Miller v. Standard Nut Margarine Co.*, *supra*, were met by the proof and the findings of

the court; and we think, moreover, that the injunction was justified under *Allen, Collector of Internal Revenue v. Regents of the University System of Georgia*, 1938, 304 U.S. 439, where it is said, at pages 448-449: "The dispute as to the propriety of a suit in equity must be resolved in the light of the nature of the controversy. . . . These extraordinary circumstances we think justify resort to equity. What we have said indicates that R.S. 3224, *supra* [now § 7421], does not oust the jurisdiction. The statute is inapplicable in exceptional cases where there is no plain, adequate, and complete remedy at law. This is such a case, for here the assessment is not of a tax payable by respondent but of a penalty for failure to collect it from another." The facts here bring this case closely in line with that case, as well as *Hill v. Wallace*, 1922, 259 U.S. 44, 62; *Dodge v. Brady*, 1916, 240 U.S. 122; and *Lassoff v. Gray*, 6 Cir., 1959, 266 F. 2d 745, and the cases therein listed at page 746.

Based upon the published opinion of the court below, supplemented by these comments, the judgment appealed from is

Affirmed.

RIVES, Circuit Judge, Dissenting:

This suit seems to me one to restrain the collection of a tax clearly prohibited by Section 7421(a) of the 1954 Internal Revenue Code.¹ Admittedly, the suit does not fall within the express exceptions

¹ § 7421. *Prohibition of suits to restrain assessment or collection*

"(a) Tax.—Except as provided in sections 6212 (a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." 26 U.S.C.A. § 7421.

which relate to insufficiency of the notice of deficiency provided in Sections 6212 (a) and (c), and 6213(a). Under familiar rules of construction, the statute having provided express exceptions to its prohibition, it would seem that implied exceptions are excluded. However, both the learned district judge and the majority of this Court feel that implied exceptions are provided by *Müller v. Standard Nut Margarine Company*, 1932, 284 U.S. 498, and that this suit falls within such exceptions. With deference, I disagree on both scores.

The courts have been prohibited from entertaining suits for the purpose of restraining the assessment or collection of any tax since 1867.* The rationale and philosophy of that prohibition was first clearly stated in *Cheatham, et al. v. United States*, 1875, 92 U.S. 85, 89:

"If there existed in the courts, State or National, any general power of impeding or controlling the collection of taxes, or relieving the hardship incident to taxation, the very existence of the government might be placed in the power of a hostile judiciary. *Dows v. The City of Chicago*, 11 Wall. 108. While a free course of remonstrance and appeal is allowed within the departments before the money is finally exacted, the general government has wisely made the payment of the tax claimed, whether of customs or of internal revenue, a condition precedent to a resort to the courts by the party against whom the tax is assessed. In the internal-revenue branch it has further prescribed that no such suit shall be brought until the remedy by appeal has been tried; and, if brought after this, it must be within six months after the decision on the appeal. We regard this as a condition on

* March 2, 1867, c. 169, § 10, 14 Stat. 475.

which alone the government consents to litigate the lawfulness of the original tax. It is not a hard condition. Few governments have conceded such a right on any condition. If the compliance with this condition requires the party aggrieved to pay the money, he must do it. He cannot, after the decision is rendered against him, protract the time within which he can contest that decision in the courts by his own delay in paying the money. It is essential to the honor and orderly conduct of the government that its taxes should be promptly paid, and drawbacks speedily adjusted; and the rule prescribed in this class of cases is neither arbitrary nor unreasonable."

Since then that reasoning has been often repeated.² If a fair and adequate administrative remedy is provided, due process does not require an opportunity for judicial review of tax liability.³ The suit in the present case was filed only after the Appellate Division had "carefully considered your claims for abatement of employment taxes as listed below and the information furnished by your representatives," and had "concluded that there is no overassessment of employment taxes." While the result is questioned, there has been no contention or holding that such review does not constitute a fair and adequate administrative remedy.

Properly interpreted, *Miller v. Standard Nut Margarine Company*, *supra*, is not an attempt of the judiciary to emasculate by implied exceptions the clear and explicit prohibition of jurisdiction contained in the statute. The theory of that case is that the exaction was not a true tax, but simply an "attempted

² E.g., *Graham v. duPont*, 1923, 262 U.S. 234, 254, 255, and the cases there cited.

³ *Anniston Manufacturing Co. v. Davis*, 1937, 301 U.S. 337, 342, 343.

exaction by a tax official under the guise of an assessed tax." That theory was thus stated by Judge Walker for this Court,* and was explicitly adopted by the Supreme Court:

"And this court likewise recognizes the rule that, in cases where complainant shows that in addition to the illegality of an *exaction in the guise of a tax* there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collector." (Emphasis supplied.)

Miller v. Standard Nut Margarine Company, 1932, 284 U.S. 498, 509.

That *Miller v. Standard Nut Margarine Company* presented such an exceptional case as to amount to an abuse of jurisdiction by the tax officials is made apparent in the extended and able analysis of that case in *Homan Mfg. Co. v. Long*, 7 Cir., 1957, 242 F. 2d 645, 651-653. In no other case has the Supreme Court permitted an injunction to restrain the assessment or collection of a tax. The cases are collected and discussed in 9 Mertens Law of Federal Income Taxation, Zimet Revision, Section 49.212, where it is stated:

"With just one exception, those cases in which the Supreme Court has permitted injunctions restraining Government officials were all cases in which the Court held that the purported tax sought to be restrained was in reality not a tax but a penalty, and the Court said that the statutory prohibition did not apply to the collection of penalties. The decision in *Miller v. Standard Nut Margarine Company* is the only case in which the Supreme Court clearly held that although no penalty was involved, the circumstances were so special and

* *Miller v. Standard Nut Margarine Co.*, 5 Cir., 1931, 49 F. 2d 79, 84.

extraordinary as to render inapplicable the statute prohibiting the maintenance of a suit to restrain the collection of taxes."

The rationale of *Miller v. Standard Nut Margarine Company, supra*, cannot be extended to bring within some supposedly implied exception cases like the present one without emasculating the prohibition contained in the statute. That much was recognized by Judge Sanborn, speaking for the Eight Circuit, in a case which seems to me directly in conflict with the holding of the majority in the instant case:

"It is true that where a complainant demonstrates that what purports to be a tax is merely an exaction in the guise of a tax and that there are special and extraordinary circumstances which bring the case under some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collection of the pseudo-tax. *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 509, 52 S. Ct. 260, 76 L.Ed. 422. The validity of the taxing act under which the assessments against appellant were made has been sustained. *Steward Machine Co. v. Davis*, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279, 109 A.L.R. 1293; *Helvering v. Davis*, 301 U.S. 619, 57 S.Ct. 904, 81 L.Ed. 1307, 109 A.L.R. 1319. The assessments are for taxes, and not for exactions in the guise of taxes. The appellant may not owe them, but that does not change their nature, nor is non-liability a special or extraordinary circumstance. This case presents the ordinary situation of a taxpayer resisting payment of taxes which he believes that he does not owe. That the appellant is in poor financial condition, that it will be a hardship upon him to pay the taxes and sue for their recovery, that to compel him to pay them threatens ultimate ruin to his business, and that a court of Iowa has ruled

that appellant was not an employer of the drivers of his cars and was not liable for contributions under the Iowa Unemployment Compensation Law, Chap. 77.2, Code of Iowa, 1939, §1551.07, et seq., we do not regard as 'special and extraordinary circumstances' which would justify the maintenance of this action to enjoin the collection of these taxes."

Kaus v. Huston, 8 Cir., 1941, 120 F. 2d 183, 185. See also, *Homan Mfg. Co. v. Long*, 7 Cir., 1959, 264 F. 2d 158, 160.

In the present case, the taxes are not attacked as themselves unconstitutional or illegal, nor is any question raised as to the good faith of the tax officials in assessing the taxes against the plaintiff. Instead, the question is closely and hotly litigated purely as a question of fact, thus stated by the district court:

"The main question posed for solution is whether or not the captains and crewmen who performed fishing services aboard trawlers of which the plaintiff was the owner or the lessee, were employees within the meaning of Sections 1426 and 1607 of the Internal Revenue Code of 1939, 26 U.S.C. A. §§ 1426, 1607, and Sections 3121 and 3306 of the Internal Revenue Code of 1954, 26 U.S.C.A. §§ 3121, 3306. If the relationship of employer-employee existed then the tax was properly assessed. If the relationship of employer-employee did not exist, then the levy was unlawful."

Williams Packing & Navigation Co. v. Enochs, S.D. Miss., 1959, 176 F. Supp. 168, 170.

This is a more extreme application of *Miller v. Standard Nut Margarine Company*, *supra*, than has ever before been countenanced by this Circuit.* Very

* See for example, *United States v. Curd*, 5 Cir., 1958, 257 F. 2d 347, 350; *Enochs v. Green*, 5 Cir., 1959, 270 F. 2d 558, 561; *McDonald v. Phinney*, 5 Cir., 1961, 285 F. 2d 121, 122.

clearly, I submit, this case is not one of an illegal exaction in the guise of a tax.

Just as clearly, the case is not brought within the second requisite of the rule, viz., "special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence." *Miller v. Standard Nut Margarine Company, supra*, 284 U.S. at 509. Equity may enjoin vexatious litigation not brought in good faith but instituted for annoyance and oppression. 43 C.J.S., Injunctions, Sec. 39; 28 Am. Jur., Injunctions, Sec. 210. I know of no case, however, permitting an injunction merely upon the basis of financial hardship, and so to do would be an obvious unequal application of the law to the poor and to the rich.

Further, under the facts and circumstances of this case, the taxpayer should not be permitted to establish irreparable damages by hiding behind the corporate fiction, when for all practical purposes, including financial, the taxpayer corporation and the De Jean partnership were parts of an integrated operation under the control and direction of the same two individuals. *Southern Pacific Co. v. Lowe*, 1918, 247 U.S. 330.

I therefore respectfully dissent.

JUDGMENT

Extract From the Minutes of June 14, 1961

J. L. ENOCHS, DISTRICT DIRECTOR OF INTERNAL
REVENUE v. WILLIAMS PACKING & NAVIGATION CO.,
INC.

No. 18272

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

"RIVES, *Circuit Judge*, Dissenting."

APPENDIX B

**UNITED STATES DISTRICT COURT, S. D. MISSISSIPPI,
JACKSON DIVISION**

Civ. A. No. 2690

**WILLIAMS PACKING & NAVIGATION CO., INC., v. J. L.
ENOCHS, DISTRICT DIRECTOR OF INTERNAL REVENUE**

July 3, 1959

MIZE, District Judge.

This is a controversy between the Williams Packing & Navigation Co., and J. L. Enoch, District Director of the Internal Revenue and arises as a result of a determination of the Commissioner of Internal Revenue that the persons upon whose compensation the taxes involved were assessed were employees of the plaintiff within the meaning of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act. An assessment was made by the director against the plaintiff for the years 1953, 1954 and 1955 in the total sum of \$41,568.57. The main question posed for solution is whether or not the captains and crewmen who performed fishing services aboard trawlers of which the plaintiff was the owner or the lessee, were employees within the meaning of Sections 1426 and 1607 of the Internal Revenue Code of 1939, 26 U.S.C.A. §§ 1426, 1607, and Sections 3121 and 3306 of the Internal Revenue Code of 1954, 26 U.S.C.A. §§ 3121, 3306. If the relationship of employer-employee existed, then the tax was properly assessed.

If the relationship of employer-employee did not exist, then the levy was unlawful.

The corporation leases boats to a captain who employs his own crew and each captain has complete control over the boat and crew and no right of control is reserved by the corporation. The captain and crew determine when they shall depart for fishing waters and where to go. The catch is returned and sold, and the proceeds are divided up by the captain after one share is deducted for the boat.

This case, like so many other cases, depends upon the individual facts as brought out here and not upon methods of other similar concerns engaged in like business. No uniform pattern covering the entire United States can be formulated except where the facts are identically the same. The judgment to be rendered in this case must be determined from the facts of this particular case, including all the exhibits and reasonable inferences therefrom and the conduct of the parties so far as it may have probative force upon the issues. The law must be determined from the Acts of Congress, the judicial interpretations by the courts and the Treasury Regulations insofar as the Treasury Regulations are made within the scope of the powers granted to it by Congress.

The record is a lengthy one and there are some conflicts in the testimony, but on the whole the testimony is practically undisputed as to the manner in which the plaintiff conducts its business. The plaintiff, Williams Packing & Navigation Co., Inc., is a Louisiana corporation and was organized in June of 1944 and granted a charter by the State of Louisiana and is qualified to do business in Mississippi. Elmer Williams, Carroll Williams, Jr., and Lucius Frieberger, citizens of Mississippi, were the incorporators, with Elmer Williams, president, owning nineteen shares,

Carroll Williams, Jr., secretary-treasurer, nineteen shares, and Lucius Frieberger two shares. The purpose of the corporation was to engage in the seafood packing business, to own, operate, lease, manage and control boats, machinery, appliances and tackle for the purpose of engaging in the fishing operations, fishing for, dredging and catching oysters, shrimp, crabs and other species of fish.

It has operated under its charter continuously from year to year since the date of its incorporation and is a bona fide corporation existing under the laws of the State of Louisiana. It was not organized for the purpose of evading the payment of any taxes of any type and at the time of its incorporation, as well as now and continuously since its incorporation, was to engage in a legitimate business, which it has done. If it were to operate for oysters in the waters of the State of Louisiana it was necessary and imperative that it incorporate in that state, insofar as oysters were concerned. Other than catching shrimp, oysters and other fish in the State of Louisiana, its principal place of business is at Biloxi, Mississippi. In the conduct of its business it leased the greater part of the time from the DeJean Packing Company, a partnership, some eighteen or twenty shrimp trawlers, and in March, 1952 bought from the DeJean Packing Company two additional fishing vessels which were built by the DeJean Shipyard Company in Biloxi. These two vessels were resold in 1957 to the DeJean Packing Company.

Elmer Williams, the president of the corporation, is the General Manager, including business manager and looking after the details of carrying on the work, particularly within the past few years. Carroll Williams, Jr., at the time of the trial of the lawsuit, was in bad health and had been for several years, but partici-

pated in the discussions frequently with Elmer as to the methods of carrying on the business. Lucius Frieberger was and is the bookkeeper and attends to the major part of the office details of the business. A fairly accurate set of books is kept on behalf of the corporation, but because of the nature of the business not such a set of books as could be characterized as a full and complete set of records. Among other things that Frieberger keeps is an account of the trip expenses for each boat and the catch made by each boat. He handles the financing and banking details of the corporation, issues the checks to the captains of the boats after having computed how much is due for a catch and turns the check over to the captain, who cashes it and pays off the men employed by the captain to assist him in the operation of the boat.

It has been the custom on the Coast of Mississippi since the seafood packing industry started that fishing vessels have operated upon a share or lay basis, but the details of this customary way varied between some of the packers and that is the reason that it is necessary to determine how the corporation in this particular case conducted its business.

This corporation retained no control over the captain or his men after a vessel had been let to a captain upon his application for a boat or to one selected by Elmer Williams and picked by him to operate the boat. There was no fixed time usually for which a boat would be let to a captain. Occasionally it would be for a trip, but usually and customarily for a season. Elmer Williams, the president, the record shows, knew practically all of the fishermen along the Coast of Mississippi and knew the capable and competent ones to whom he safely could entrust a boat owned by the corporation or leased by it and they would reach an agreement by which the boat would be

let to the captain for either trips or for the season. The corporation, acting through Elmer Williams, reserved no right of control over the captain, but leased or let the boat to the captain with the distinct understanding that the captain would hire all of his men or helpers and could fire them without any right whatsoever on the part of the corporation to hire or fire any of the employees of the captain. The transaction partook very much of the nature of a contract. The corporation could not fire the captain, but if the captain were guilty of a breach of a contract, just as in any other contractual relationship, the inference is from the testimony that the corporation could then require the captain to return the boat because of a breach of contract, but not because of any retained right of control over the captain.

When the captain takes possession of the boat he takes the papers to the office of the Bureau of Customs, where he obtains the necessary statutory endorsement on the papers as captain of that boat. Then it is that the captain employs the number of fishermen necessary to complete the crew as may be determined by the captain; in the industry here on the Coast the crew is usually two for shrimping and four for dredging oysters. A voyage may last from ten days to two weeks, depending upon the weather and the type of seafood for which they are looking. The boat and crew are then completely under the supervision and control of the captain, who leaves port when he desires, fishes where he pleases and returns when he pleases. The captain procures the fuel, groceries and ice, and determines for himself the amount that will be needed for his voyage. The captain may purchase his fuel and groceries wherever he desires, but usually purchases his fuel at the DeJean docks and his groceries at the grocery store of

Leon Hall. Leon Hall is the son-in-law of Elmer Williams and operates successfully a grocery store.

The testimony shows that the captains of these boats purchased a great part of their groceries during the years involved from Leon Hall, but not because he is a son-in-law of Elmer Williams; it is because of his efficiency and accommodation in delivering groceries to the boats, rather than having the captain and crew go to a grocery store to purchase their own groceries and make delivery themselves. Leon Hall charges groceries to the account of the boat captain or to the boat, makes deliveries, and if he does not have the groceries in his own store, will send out and get them. He is conveniently located to the boats and it easily can be seen why the captains patronize a store of this type. Their patronage is not due to any coercion whatsoever upon the part of Elmer Williams or of the corporation. The captains usually obtain their equipment from the DeJean Packing Company and their ice from the Biloxi Freezing Company. The ice blocks, which are delivered to the docks for loading, are reduced to size for boat use by an ice crusher located at the DeJean docks. Elmer Williams is a partner in the DeJean Packing Company and is vice-president and a stockholder in the Biloxi Freezing Company and, while an uneducated man, yet he is a successful business man, very energetic and accommodating. It is because of the convenience and accommodation that the captains of the various boats have in this set-up that they patronize these other industries or businesses in which Elmer Williams is interested. It is not because of any reserved control, right of control or coercion on the part of the corporation or Elmer Williams.

As hereinabove stated, the purpose and business of the corporation is to catch and sell seafoods with boats either owned by them or leased by them. The captains usually sell their output or catch to the DeJean Packing Company, but there is no requirement that they so do. They are at liberty, if they can get a better price than offered by DeJean, to sell their catch when and where they please. When one of these boats comes in with a catch it usually docks at the DeJean docks where the catch is sold, and if sold to DeJean, the catch is unloaded on a conveyor system at the docks and on this conveyor system ultimately is weighed and then moved into the processing operations of DeJean Packing Company, DeJean Packing Company being engaged in the processing of seafood. A record is made of the weight of the catch, given to the captain, who takes it to Lucius Frieberger, who totals up and calculates the amount of money the catch represents. Frieberger adds up the trip expenses, including the fuel, groceries and ice, etc., and then these expenses are deducted from the value of the gross catch and the net cash is divided between the captain and his crew, one share going to each, one share going to the boat (generally known as the boat share), and one share goes for the rig until the rig is paid for. The check is made payable to the captain, who makes the distribution.

There is another feature shown by the record to the effect that if a trip is unsuccessful it is generally called a broker, and means that no catch was made where the value of the catch is sufficient to cover the cost of the trip. Under these circumstances the unpaid cost of the trip is carried forward to succeeding trips to be deducted from subsequent catches before any subsequent disbursements are made to the fishermen on these subsequent catches. It occurs oc-

casionaly under these circumstances that the corporation may advance money to the fishermen out of its own general fund with the expectation of being repaid. This is no requirement by the terms of the contract, but simply a gratuity on the part of the corporation, I would say, in order to maintain the good will of the fishermen. If one of the fishermen on such a broker is not employed again by a captain, then the corporation simply loses that amount of money.

The defendant introduced in evidence certain hospital records of the Marine Hospital at New Orleans, which contained statements made by the corporation against interest, and possibly it brought out other statements against interest. Likewise, the plaintiff points to the conduct of the Government in indicting the Fishermen's Union, charging that they were not employees, and in that case, in the prosecution of the indictment, contended and urged that the fishermen were not employees. These statements against interest are admissible in evidence and competent to the issues, and in this case were considered by the court along with all the other evidence in reaching a judgment herein. However, statements against interest made by a party are not conclusive, but are only to be considered as a part of the evidence, along with all the other facts in the case, and after so being considered, it is then the duty of the court to determine the actual facts. See 31 C.J.S. Evidence §§ 377, 378 and 379, pp. 1161 to 1164.

The investigation of the Internal Revenue Service was commenced in March, 1956 and on July 17, 1956, formal notice was given to the corporation and demand made for the payment of the taxes. On September 5, 1957, the corporation filed this suit seeking permanently to enjoin the collection of the tax on

the ground that it was illegally assessed and that to be required to pay that large amount of money would wreck and ruin the corporation, and were such unusual circumstances because of its illegality and the inability of the corporation to pay, that an injunction was warranted, notwithstanding Section 7421(a) of the Internal Revenue Code of 1954, 26 U.S.C.A. § 7421(a), which provides that no injunction shall issue restraining the assessment or collection of a tax. As a matter of law, it is a rare case where an injunction will issue, but where the tax is illegal and there exists some unusual and extraordinary circumstance, then it is appropriate to grant injunctive relief. The corporation has always assumed that it was not liable for taxes of this nature for the reason that the relationship of employer and employee did not exist, and prior thereto no contention by the Government had been made to it. It alleged that being suddenly called upon to pay \$41,568.57 was more than it could do. I find as a fact that if the levy had been made upon the assets of the corporation it would have wrecked the corporation and thrown it into bankruptcy, as it did not have and does not have assets with which to pay the taxes and not sufficient assets with which it could have negotiated a loan to pay the tax.

It was the theory, and is the theory, of the Government that the DeJean Packing Company is able to pay the tax and that because of the relationship of Elmer Williams to the corporation and to the partnership that the corporation had it within its power to require the DeJean Packing Company to pay the tax for it if the corporation be liable. However, as heretofore stated, this contention is not sustained by the evidence. The record clearly shows that the DeJean Packing Company is completely a separate and

independent entity from that of the corporation and the DeJean Packing Company is under no duty or requirement of law to pay the tax for the corporation. It is a partnership composed of Elmer Williams and his wife, and Carroll Williams and his wife.

The corporation is engaged only in production of raw materials and sells practically all of its product to the DeJean Packing Company. At the time of the filing of the suit it owned two vessels worth approximately twenty-one or twenty-two thousand dollars, and its only assets of any value were the leasehold interest it had upon boats and the good will and value of its right to fish in the waters of Louisiana. The balance sheet of the corporation shortly before the suit was filed showed that it had a deficit of approximately \$300, and the record shows that from time to time there were overdrafts and on other occasions where it had a fairly good bank account, but not sufficient to pay the sum of \$41,568.57 in a lump sum, and, as before stated, if the Government had been permitted to execute upon the property and seize and sell it, it would totally wreck and ruin the corporation. The corporation is entitled to continue its existence because its charter has value and gives it valuable rights in Louisiana, and as long as it complies with all the federal laws it should not be permitted to be destroyed.

The burden of proof, of course, is upon the corporation to show that it was an unusual hardship to be required to pay an illegal tax, and in this case it has so shown by the burden of proof that to pay the illegal tax would put it out of business.

The Government complains of bad faith on the part of the plaintiff and concealment of evidence. The court finds as a fact that the plaintiff was not guilty of any bad faith or any intentional concealment of

any records or evidence. The record does show that some of the documents requested by the Government and ordered to be furnished by the court were not delivered within the time directed by the court, but it was due to the inability of the plaintiff to locate these documents—not to intentional conduct on the part of the plaintiff—and when they were located they were furnished to the defendant and the court gave the defendant ample opportunity for full examination of all documents they desired to look at.

I find as a fact that the relationship of employer and employee as defined by the Social Security Act, 42 U.S.C.A. § 301 et seq., did not exist and does not exist between the corporation and the captains of the boats and the crewmen, and that the tax was illegally and unlawfully levied, and that to have permitted the director to proceed to levy upon the property of the corporation would have destroyed the business of the corporation and completely wrecked it and worked an unusual and extraordinary hardship upon the corporation, and under these circumstances the temporary injunction was properly issued and should be permanent.

Counsel for plaintiff and defendant have filed elaborate briefs, which have been very helpful to the court and which have cited many authorities, but it will not be necessary to refer to each particular authority cited by the respective parties and to do so would unduly prolong this opinion.

The law is well settled that if a tax has been levied and demanded that is illegal and the alleged taxpayer cannot pay it without undue hardship and that the circumstances are unusual, he then is entitled to an injunction. See *Midwest Haulers v. Brady*, 6 Cir., 128 F. 2d 496; *John M. Hirst & Co. v. Gentsch*, 6 Cir. 133 F. 2d 247. It is well settled that under ordinary

circumstances an injunction will not issue, but that an alleged taxpayer who disputes the liability of the tax must pay it and sue for recovery of it. This principle needs no citation nor authority. Likewise, hardship placed upon an alleged taxpayer does not justify the issuance of an injunction. See *Reams v. Vrooman-Fehn Printing Co.*, 6 Cir., 140 F. 2d 237. On the other hand, where it is shown that the tax is illegal and that there are exceptional and extraordinary circumstances, then it is appropriate to grant an injunction. See *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 52 S. Ct. 260, 76 L. Ed. 422; *United States v. Curd*, 5 Cir., 257 F. 2d 347. See also *United States Mutual Benefit Ass'n v. Welch*, 6 Cir., 268 F. 2d 201.

I therefore conclude as a matter of law that it was appropriate to grant the temporary injunction.

Having found as a fact that the relationship of employer-employee did not exist, it is not necessary to determine what the relationship of the parties really is, but apparently, insofar as the corporation and the captains are concerned, it is the relationship of lessor and lessee or joint adventurers, as was claimed by the Government, in the *Gulf Coast Shrimpers and Oystermans Association v. United States*, 5 Cir., 236 F. 2d 658, or that of independent contractors. The crewmen were employed by the captain, or joint adventurers with him. It is not necessary to discuss all the authorities that have been cited by the plaintiff and the defendant touching upon the relationship of the parties. It is sufficient to cite the cases of *Bartels v. Birmingham*, 332 U.S. 126, 67 S. Ct. 1547, 91 L. Ed. 1947; *United States v. Silk* (*Harrison v. Greyvan Lines*), 331 U.S. 704, 67 S. Ct. 1463, 91 L. Ed. 1757; and *Gulf Coast Shrimpers and Oystermans Association v. United States*, 5 Cir., 236 F. 2d 658, and the authorities that were cited by the court in these decisions.

I shall not undertake to differentiate all the cases cited by the defendant and relied upon by him, but simply call attention to the fact that each particular case is governed by its own facts. The case of *Maryland Casualty Co. v. Grant*, 39 Ga. App. 285, 146 S.E. 792, a Georgia case, is easily distinguishable from the facts in the instant case. To a certain point the facts are the same, but at the crucial point the facts are different. In that case the canning company reserved the right to fire the captain operating the boat at any time it desired and without cause, and giving a liberal construction to the Workmen's Compensation Act of Georgia, the court held that the captain was an employee of the canning company rather than an independent contractor. *Southern Shell Fish Company v. Plaisance*, 5 Cir., 196 F. 2d 312, is a case wherein the court held that it was properly submitted to the jury to determine an issue of fact as to whether the plaintiff in that case was an employee of the Southern Shell Fish Company or of the vessel's captain as an independent contractor of the vessel, and that the record showed that there was evidence that would support either theory. In that case there also was an additional circumstance of insurance coverage, which is a circumstance to be taken into consideration in determining whether the relationship of employer-employee exists or that of an independent contractor. See *Finkbine Lumber Co. v. Cunningham*, 101 Miss. 292, 57 So. 916.

These examples of the authorities simply illustrate the point that each case will be determined by the facts of the particular case and that no general pattern can be established or formulated. The record in the *Gulf Coast Shrimpers and Oystermans Association* case, *supra*, well demonstrates that fact and the fact that all the packers on the Coast of Mississippi

do not have identical patterns. In that case it was shown by one of the packers that he paid Social Security on his employees and retained sufficient control over the operations of the captains as would make them employees. On the whole, however, as shown in that case, the relationship of employer-employee does not exist and it was so contended by the Government in the case. While the Government is not estopped by taking a contrary position, yet the contention of the Government at that time is very persuasive, and the judgment of the court and the opinion of the Supreme Court denying certiorari establishes that the relationship of employer-employee did not exist. The court, during the trial, declined to submit the issue to the jury and in the absence of the jury agreed with the contention of the Government and found as a fact that the relationship of employer-employee did not exist and stated that if it did exist, then the defendants would be entitled to a directed verdict, but declined and refused instructions requested by the defendants to submit it to the jury. This action of the trial court was affirmed.

It is not necessary to give the history of the present act of Congress, but suffice it to say that the act as it finally came out of the Congress defined an employee to mean "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee". It is, therefore, clear that Congress adopted the definition of an employee to be that as understood under the common law realistically applied, in determining whether the relationship of employer-employee existed. The various cases construing the act prior to 1948 were discussed in the report of Senator Milliken from the committee on finance, and Congress finally adopted the definition above quoted.

Applying the common-law rule, it is clear in this case as a matter of law that the relationship of employer-employee does not exist between a corporation engaged in the business that the plaintiff is and the captains of the boats as shown in this particular record. No one criterion can be announced that will define and determine that relationship, but the right of control is one of the important elements. In determining what the common law is, the decisions of the federal courts rather than of the various states must be looked to in order to determine what it is. Treasury Regulation 107, Sec. 403.2045 recognized this doctrine. The Treasury Regulations have the force of law where they are within the perimeter of the Acts of Congress. If they exceed the authority granted by Congress, then, of course, they are without weight.

The defendant in this case contends that the corporation in this case is a sham and a shell and that its corporate existence and charter may be entirely disregarded, and cites the case of *Gregory v. Helvering*, 293 U.S. 465, 55 S. Ct. 266, 79 L. Ed. 506; *Higgins v. Smith*, 308 U.S. 473, 60 S. Ct. 355, 84 L. Ed. 406. Under the facts of the present case those authorities are not applicable, but, on the other hand, the facts of the present case bring it within the doctrine of *Moline Properties v. Commissioner*, 319 U.S. 436, 63 S. Ct. 1132, 87 L. Ed. 1460, and as announced in that case the corporation is one that was organized for a legitimate purpose and authorized by applicable law.

I conclude as a matter of law that the tax was illegally assessed and that the granting of the injunction was appropriate and that the injunction should be made perpetual.

An order may be drawn in accord herewith.

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JOHN E. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. **493**

J. L. ENOCHS, DISTRICT DIRECTOR OF
INTERNAL REVENUE,

Petitioner,

versus

WILLIAMS PACKING & NAVIGATION CO., INC.,

Respondent.

*BRIEF IN OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT.*

S. E. MORSE,
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Gulfport, Mississippi;

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**BRIEF IN OPPOSITION TO PETITION FOR WRIT
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COMMENT ON QUESTION PRESENTED.

Judge Rives in his dissent and the government in its brief express apprehension that the majority opinion, affirming the lower Court, constitutes a great departure from the *rationale* of *Miller v. Nut Margarine Co.*, 284 U. S. 498. We think this concern is misplaced. In every case concerning a taxpayer's efforts to enjoin the assess-

ment or collection of a tax the Court has recognized the ancient policy of the government to require the taxpayer to pay first and litigate later, has examined closely the contention that the tax is illegal, and given particular scrutiny to the alleged "exceptional and extraordinary" circumstances on which a request for equitable relief is predicated. In none of the cases in which the taxpayer has prevailed has the government conceded to the taxpayer that any one or all of the requirements declared in *Miller* have been met.¹

In short, it can be expected that whenever a taxpayer prevails in such a suit as this, the government will urge that the decision presents a threat to the orderly collection of the government's revenue, and that it is in conflict with the numerous decisions denying equitable relief to the taxpayer.

The District Court and the majority of the Court of Appeals did not intend to depart from *Miller*, nor did they do so. Judge Rives and the government in its brief treat this case as one which determined the nonliability of a tax, rather than the imposition of an exaction in the guise of a tax. The imposition of the tax itself has always been treated by respondent as illegal.

THE ILLEGAL ASSESSMENT.

What constitutes the imposition of an illegal tax is a matter which the government defines in the narrowest

¹ *Midwest Haulers v. Brady* (CC6th 1942) 128 F. (2d) 496; *John M. Hurst & Co. v. Gentch* (CC 6th 1943) 133 F. (2d) 247. In both cases the taxpayer sought and obtained an injunction against the collector, enjoining him from collecting FICA and FUTA taxes. In *Brady*, the taxpayer owed some of those taxes, and the suit was brought for the purpose of enjoining the collection of additional taxes.

terms possible . . . it is a tax "the imposition of which is arbitrary and capricious and could by no legal possibility be assessed." (Petitioner's Brief, p. 6.) That language is taken from *Miller*. It is the language of the Supreme Court of the United States having the advantage of a view of the matter in retrospect. Before that conclusion could be reached, the taxpayer was resisted by the government in his efforts to advance his contentions in the lower Court, the Court of Appeals and the Supreme Court of the United States.

Miller did nothing to the margarine act,² nor were constitutional issues decided. The Court clearly stated its reasons in the following language:

"This is not a case in which the injunction is sought upon the mere ground of illegality because of error in the amount of the tax. The article is not covered by the Act." *Miller v. Nut Margarine*, *supra*, p. 510. (Emphasis added.)

On the question of illegality of the tax, we find that the majority opinion of the Fifth Circuit is in harmony with this Court's decision in *Miller*. In both cases we have a valid tax statute but an illegal assessment against the individual. The illegality arises by virtue of the fact that the taxpayer simply does not owe the tax. In *Miller* and in this case, the determination that the tax is not owed was not conceded by the government, but resisted with all of the resources available to it. In both cases it was obvious to the taxpayer that the tax was

² "But having regard to *McCray v. United States*, 195 U. S. 27, 59, 49 L. ed. 78, 97, 24 S. Ct. 769, 1 Ann. Cas. 561, we treat the imposition laid by the Act upon oleomargarine as a valid excise tax." *Miller v. Standard Nut Margarine Co.* 284 U.S. 498, 506.

illegal, but before that position could be sustained, the taxpayer was forced to a full trial of all of the legal and factual issues; and an appeal to the Court of Appeals, to secure a decision that the taxpayer did not owe a tax under the applicable statute. In both cases the taxpayer urged a complete immunity from the tax, not a partial immunity or the right to a determination of the correctness of the assessment. In view of the factual determination by the lower Court, on the issue of the status of the captains and fishermen, the affirmance of that conclusion by the Court of Appeals and the absence of any comment by Judge Rives in his dissent on that vital issue, the first requirement of *Miller* that the tax must be illegal should be taken as satisfied by this record. That being true, this case is distinguishable from *Kaus* on that ground alone. In the latter case the lower Court determined that the plaintiff had not sustained his burden to show an illegal tax and unusual and extraordinary circumstances. Refusing to pass on the relationship of the cabdrivers to the taxpayer, the Court of Appeals felt that the lower Court lacked jurisdiction to enjoin the collection of the taxes. We do not know what the decision of the Court of Appeals would have been had the lower Court found that the cabdrivers were not the employees of the taxpayer.

SPECIAL AND EXTRAORDINARY FACTS AND CIRCUMSTANCES.

The finding by Judge Mize with respect to the effect of the assessment on the respondent is similar to the conclusions reached in *Miller*, *Brady*, *Gentsch* and *Lassoff*.³

³ If the levy had been made upon the assets of the corporation it would have wrecked the corporation and thrown it into bankruptcy as

The lower Court found as a fact that petitioner "... has always assumed that it was not liable for taxes of this nature for the reason that the relationship of employer and employee did not exist, and prior thereto no contention by the government had been made to it." The lower Court considered that the action of the government in contending that the fishermen in and around Biloxi, Mississippi, and the Mississippi Gulf Coast, were not employees of the packers' was in the nature of a declaration against interest. The Treasury Regulations adopted pursuant to the subject acts do not specifically define the relationship of the fishermen and the packers, but leave application of the act to be determined by common law tests. In a case of considerable interest to the seafood industry in Biloxi, the same judge who tried this case accepted the theory advanced by the government to the effect that fishermen and captains were not employees of the packers, utilizing the common law tests. His rulings in support of the government were affirmed by the Fifth Circuit.⁵

Other agencies of the government have concluded under circumstances similar to the facts in this case that

it did not have and does not have assets with which to pay the taxes and not sufficient assets with which it could have negotiated a loan to pay the tax. In *Miller* this court said "... the enforcement of the act against respondent would be arbitrary and oppressive, would destroy its business, ruin it financially and inflict loss for which it would have no remedy at law." In *Brady* "a sale of (taxpayer's) assets would completely destroy its business." In *Gontack* "... if collection is enforced by distraint the appellant will be ruined in its business and forced to close its mine." And in *Lassoff* "... the liens and threatened sales will be disastrous to (taxpayers) in that their properties will be sacrificed and their businesses so handicapped as to be made worthless."

⁴ *Gulf Coast Shrimpers and Oystermen's Association v. U. S.* (5th Cir.), 236 F. (2d) 658, cert. denied 352 U. S. 927.

⁵ *supra*.

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captains and fishermen are not employees of the packers to whom they sell their product."

On the need for equitable relief the Court of Appeals stated as follows:

"A peculiar equity existing in appellee's favor—which the government does not dispute except on the ground that the facts did not support the court's findings arises from the effort of the Director to enforce taxes against the corporation by coercion of its stockholders to pay the corporation's supposed indebtedness. The Director did not assess the tax against the stockholders or the partnership, but confined his effort to reach the assets of those not made parties to the assessment or brought into this action, by this indirect proceeding aimed at collecting the money from those held by the court not to be liable for it."

We would like to comment on those remarks: The assessment of the subject tax was against respondent. The respondent was a valid, subsisting corporation, organized for the primary purpose of providing a vehicle for the capture of seafood in the waters of Louisiana. The government never appraised the respondent of any doubt that the tax was owed by the respondent. No affirmative defense attacking the separate entity status of respondent was ever filed. During the trial counsel for petitioner probed into the affairs of a partnership, not a party to the

⁶ Cases cited in footnote 3, opinion of the majority in *Enochs v. Williams Packing & Navigation Co., Inc.*, 291 F. (2d) 402. These decisions are consistent with this case and the case of *Gulf Coast Shrimpers & Oyster Ass'n. v. U. S.* 236 F. (2d) 658.

suit for the purpose of showing that the partnership might be financially able to pay the assessment. This was the so-called theory of integrated operation, the nub of which was that if individuals not parties to the suit could in some way raise in excess of \$41,000.00, permitting the respondent the use of that money, respondent could ultimately sue for its refund. Here was a complete shifting of liability from the corporation to individuals. When the government failed to support its integrated operation theory in the Court, without notice to the partnership, and for reasons known only to the government, the tax which had always been treated as the obligation of respondent was shifted to the DeJean Packing Company, a partnership. The suit of *DeJean Packing Company v. Enoch*, No. 2116, cited in footnote eleven, page 9, of the government's brief followed.⁷

We think these equities are more than adequate to bring this case within the tests set out in *Miller, Brady, Gentach and Lassoff*.

THE ABSENCE OF SERIOUS CONFLICT AMONG THE CIRCUITS.

If there is conflict between this case and *Kaus*, then *Kaus* also conflicts with *Midwest Haulers v. Brady*,⁸ *John M. Hurst & Co. v. Gentach*,⁹ and *Lassoff v. Gray*.¹⁰

⁷ Its action in making that assessment against DeJean Packing Company gave rise to the suit styled *DeJean Packing Co. v. Enoch*, No. 2116, cited in footnote eleven, page nine of the government's brief. The assessment was made without prior investigation, notice or hearing.

⁸ 128 F. (2d) 496.

⁹ 133 F. (2d) 247.

¹⁰ 266 F. (2d) 745.

We think the last three cases are more in harmony with *Miller* than is *Kaus*. In *Miller*, *Brady*, *Gentsch*¹¹ and *Lassoff*,¹² the assessments were made under a valid statute. The taxpayers resisted the payment of the taxes assessed on the grounds that they did not owe the taxes. On motions to dismiss in *Brady*, *Gentsch* and *Lassoff*, the taxpayers' contentions were ultimately sustained. In none of those cases did it appear that the Collector was arbitrary; neither were the assessments malicious nor capricious. As in *Miller*, the taxpayers simply did not owe the taxes levied. *Miller*, *Brady*, *Gentsch* and *Lassoff* are instances of taxpayers successfully resisting payment of taxes which they believe they did not owe. In *Kaus*, the plaintiff was "... a taxpayer resisting payment of taxes which he believes that he does not owe."¹³ For that reason his suit was dismissed. *Kaus* disqualified the plaintiff for reasons which were accepted by the courts in *Miller*, *Brady*, *Gentsch* and *Lassoff*.

This case does not conflict with *Mensik v. Long*¹⁴ or with *Homan Mfg. v. Long*.¹⁵ In *Mensik* the assess-

¹¹ In *Brady* and *Gentsch*, the suit involved FICA and FUTA taxes.

¹² The taxes in *Lassoff* were assessed under Internal Revenue Code of 1954, sect. 4401 (26 USCA 4401), imposing a tax on gambling. Plaintiffs contended that they did not have "... and cannot acquire funds or credits sufficient to pay the assessments, or provide a bond to guarantee payment thereof and are therefore deprived of any means of contesting the illegal taxes." Court stated: "When we consider that the legality of the assessments of these taxes cannot be tested as can income taxes, but must be bonded or paid before they can be contested, it is easy to see that in many instances where very large assessments are imposed many individuals would not have any available remedy to resist the sale of the properties or to test the legality of the tax, unless they have resort to a court of equity."

¹³ *Kaus v. Newton*, 120 F. (2d) 183, 185.

¹⁴ 261 F. (2d) 45.

¹⁵ 242 F. (2d) 645.

ment was for income taxes on unadjusted capital returns, proceeds from loans, premiums collected and passed on to insurance carriers and charitable contributions. The assessing official may have erroneously assessed all or part of the items included in the assessment; only a trial would have developed the taxpayer's liability. The taxpayer had adequate remedies at law; if he were diligent he could elect to pay and sue, or could go to tax court. In this case, and in *Miller, Brady, Gentsch and Lassoff*, it was "neck or nothing"; either all of the tax was owed or none of it, and the remedy of pay first, sue later was not adequate.

It is difficult to perceive of any conflict between this case and *Homan*. In the latter the taxpayer sought and obtained an injunction, enjoining the Collector from pursuing a jeopardy assessment. The injunction was granted on the plaintiff's motion for summary judgment. Reviewing that procedure, the Court of Appeals said:

"Assuming without deciding, that there is enough case law authorizing equitable relief in the face of sect. 7421, we think preemptory relief through the vehicle of summary judgment was incorrect. Because if the court has equitable powers, regardless of Sect. 7421, they are delineated by a handful of prior opinions making it necessary to determine if the *Homan* facts come within their ambit. For we think the judicial rubrics already inserted in sect. 7421 cannot wisely be multiplied."

The Court of Appeals reversed the cause, and remanded it for proceedings not inconsistent with its opinion, observing:

"All we have decided is that summary judgment for plaintiff was improvidently granted."

CONCLUSION.

The application for a writ of certiorari should be denied, for the reason that this case represents no departure from *Miller v. Nut Margarine Co.*, 284 U. S. 498.

Respectfully submitted,

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CERTIFICATE.

I hereby certify that a copy of the foregoing brief has been served on the Solicitor General, Department of Justice, Washington 25, D. C., by air mail, postage prepaid, this _____ day of _____, 1961.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 493

**J. L. ENOCHS, DISTRICT DIRECTOR OF INTERNAL
REVENUE, PETITIONER**

v.

WILLIAMS PACKING & NAVIGATION Co., INC.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 272-284) is reported at 176 F. Supp. 168. The opinion of the Court of Appeals (R. 285-298) is reported at 291 F. 2d 402.

JURISDICTION

The judgment of the Court of Appeals was entered on June 14, 1961. (R. 298.) By order of the Chief Justice, dated September 11, 1961, the time for filing a petition for a writ of certiorari was extended to October 12, 1961. The petition was filed on that date and was granted on December 11, 1961. (R. 299.) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether, under this Court's decision in *Miller v. Nat Margarine Co.*, 284 U.S. 498, the district court had jurisdiction to entertain a suit to restrain the collection of taxes allegedly erroneously assessed, despite the prohibition of Section 7421(a) of the Internal Revenue Code of 1954.

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax*.—Except as provided in sections 6212 (a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

STATEMENT

A. THE INITIATION OF THE PRESENT PROCEEDINGS

This case originated upon the filing of a complaint (R. 1-6) by the Williams Packing & Navigation Company, Inc. (hereinafter referred to as the taxpayer) for an injunction to restrain the District Director of Internal Revenue, Mississippi, from collecting social security and unemployment taxes in the total amount of \$41,568.57, which had been assessed against it for taxable periods during the years 1953, 1954, and 1955. The assessments resulted from the determination of the Commissioner of Internal Revenue that the Captains and crewmen

who performed services as fishermen aboard trawlers owned or leased by the taxpayer were employees of the taxpayer within the meaning of the term "employee" as defined in Sections 1426 and 1607 of the Internal Revenue Code of 1939 and the corresponding provisions (Sections 3121 and 3306) of the Internal Revenue Code of 1954. (R. 272-273.) The taxpayer's complaint (R. 1-4) alleged that it was engaged in a "joint venture" with the fishermen and that no employer-employee relationship was involved.

Pursuant to the taxpayer's motion and after a hearing at which the court heard and considered oral and documentary evidence, the District Court granted a preliminary injunction. (R. 6-7.) The court made no finding that the District Director's assessment was arbitrary, capricious, or otherwise "illegal."

B. THE EVIDENCE PRODUCED AT TRIAL

The trial of taxpayer's suit to restrain the collection of assessed taxes involved the receipt of the oral testimony of eighteen witnesses, the depositions of three others, and a large number of exhibits. It produced a trial transcript of over 600 pages. The facts and evidence produced at trial may be summarized as follows.

1. *Williams Packing & Navigation Co. and DeJean Packing Co.*

Taxpayer is a Louisiana corporation, organized in June, 1944, and qualified to do business in Mississippi, with its principal place of business at Biloxi, Mississippi. Its incorporators were Elmer Williams, president (19 shares); his brother, Carroll Williams, Jr.,

secretary-treasurer (19 shares); and Lucius Frieger (2 shares). It was organized to engage in the seafood packing business; to own, operate, lease, manage, and control boats, machinery, appliances, and tackle for fishing for, dredging, and catching oysters, shrimp, crabs, and other species of fish. (R. 272-274.)

The DeJean Packing Company (hereinafter referred to as DeJean), a partnership doing business in Biloxi, Mississippi, is closely allied to taxpayer. Its members are the aforementioned Williams brothers and their respective wives. Formed in 1943 as the successor to DeJean Packing Company, Inc., a Mississippi corporation dissolved in the same year, DeJean was founded to carry on its predecessor's business of acquiring, processing, and marketing sea food, including shrimp, oysters, and certain other species of fish. (R. 31-33.) DeJean owned, operated, and controlled a group of buildings used for processing sea food. Taxpayer, with no separate telephone or post office box of its own, used these buildings and facilities as well as the business office of DeJean. (R. 44-45, 48-52, 215.)

The dominant and key figure of both taxpayer and DeJean was Elmer Williams, who spent most of his working day in and about the aforementioned premises and supervised most of the business operations of both entities. (R. 78, 89, 274.) Williams instructed Leon Hall, his son-in-law, in the operation of the plant. (R. 10-11, 23.) For his judgment "in a lot of things", particularly the financial condition and banking position of both companies, Williams depended

upon Lucius Frieberger, office manager of DeJean and a director, stockholder, and secretary of the taxpayer. Frieberger, paid by DeJean, kept the books of both DeJean and the taxpayer. (R. 54-55, 87-89, 274.)

2. *Taxpayer's methods of operation*

Elmer Williams, who knew of the fishermen along the coast of Mississippi, including the capable and competent ones to whom he safely could entrust the boats which the taxpayer owned or leased, would let a boat to a captain of his selection for particular trips or for the fishing season. Upon taking possession of the boat, the captain would take the requisite papers to the office of the Bureau of Customs for the necessary statutory endorsement thereon. (R. 34, 36-37, 182, 205-206, 275-276.) The captain would hire the crew (usually two for shrimping and four for dredging oysters) and would procure the necessary fuel, groceries, and ice for the fishing trip, which might last from ten days to two weeks. The fuel would usually be purchased at the DeJean docks from that company's fuel facility. (R. 34-35, 77, 124, 172, 182-183, 221, 254, 276.) Ice would be obtained from the Biloxi Freezing Company, a corporation of which Elmer Williams was vice-president and a stockholder. Groceries would be purchased at a store owned by Leon Hall (DeJean's production manager and Elmer Williams' son-in-law). Other equipment would be obtained from the DeJean trawl shop. The items purchased would be initially charged to the taxpayer and later deducted from the gross price allowed for a catch. (R. 35, 41, 64-66, 174, 221-222, 264, 276.)

When a catch was brought in to the DeJean docks and sold to DeJean, it would be unloaded on a conveyor system, weighed, and thereafter processed by DeJean. A record of the catch would be made and given to the captain, who would then take it to Frieberger. Frieberger, acting for the taxpayer, would compute the value of the catch at prices which the taxpayer fixed (evidenced by price lists issued to the boat captains from time to time); deduct therefrom the expenses of the trip (fuel, groceries, ice, etc.); and divide the remainder into shares—one share each to the captain and each member of the crew, one share to the taxpayer for use of the boat (the boat share), and another to the taxpayer for the rig (nets, equipment), until the latter was paid for. A check would be made payable to the captain, who, in turn, would make distribution to the crew. This method of compensation was known as the share, or "lay", system.¹ (R. 41, 90-91, 163, 277; Deft. Ex. 18, R. 239-240.)

3. *The financial relationship between the taxpayer and DeJean*

The taxpayer invoiced DeJean at the end of each month for the total amount of the product delivered. The transaction was recorded on the taxpayer's books as a sale to DeJean. DeJean's books reflected a cor-

¹ On occasions a trip resulted in a "broker", i.e., no catch, in which event the unpaid costs of the trip were carried forward and deducted from the catch of a succeeding trip. In the event of a "broker" the taxpayer advanced money to the fishermen out of its general funds. When a captain and crew members left the taxpayer's service, the taxpayer absorbed the loss attributable to advances or extensions of credit. (R. 41-42, 70, 74-75, 277-278.)

responding purchase from, and a liability to, the taxpayer. From time to time (as determined by Frieberger), DeJean issued checks to the taxpayer in varying sums, also determined by Frieberger, which did not necessarily reflect the full amount of any invoice. Frieberger admitted that it was within the scope of his employment to determine how much money should be paid to the taxpayer. (R. 90-92, 115-116.)

The taxpayer and DeJean both operated on the same fiscal year basis. At the end of each such year and after audit, the taxpayer negotiated with DeJean a so-called "handling charge", or "profit", for itself (R. 106), the amount of which Elmer Williams and Frieberger determined (R. 68-69; and see Deft. Ex. 14, R. 233-237). The "handling charge" per the monthly invoice was one-half cent per can for oysters; it varied from \$1 to \$1.50 per barrel for shrimp. (Deft. Ex. 14, Schedule B-2, R. 235). Following the close of each fiscal year the "handling charge" or "profit" was usually arbitrarily increased—retroactively for each barrel of shrimp and can of oysters—when the taxpayer's boat expenses exceeded its income from boat shares. (Deft. Ex. 14, R. 235; R. 106.)

4. Taxpayer's financial condition

The taxpayer consistently lost money on its sales of fish to DeJean from the fiscal year ending in June 1952 to that ending in June 1958. (Deft. Ex. 14, Schedule A, Line 3, R. 233.) However, the monthly and annual receipts in the name of "handling

charges" resulted in an overall profit for the fiscal years through 1955. As of June 30, 1955, and, in so far as the record shows, as of the date on which the taxpayer learned of the assessments here involved, taxpayer had an accumulated surplus slightly in excess of \$50,000. (Deft. Ex. 14, Schedule A, Line 8, R. 233.)

At the conclusion of fiscal 1956, after the taxpayer had received notice of the tax here in issue (R. 231-232), the taxpayer's practice underwent the following change. For fiscal 1956, the taxpayer incurred a loss from boat operations in the amount of \$50,529.89. The handling charge it received per monthly invoices was only \$13,337.484. (Deft. Ex. 14, Schedule A, Lines 3-4, R. 233.) No year-end increase was made in the handling charge (Deft. Ex. 14, Schedule B-2, par. 1, Line 2, R. 235), and the taxpayer accordingly incurred a net loss for the year in the amount of \$37,615.58 which decreased its accumulated surplus to \$16,373.09 (Deft. Ex. 14, Schedule A, Lines 7-8, R. 233). No year-end adjustment increasing the handling charge was made for fiscal 1957, during which period the expenses from boat operations exceeded the taxpayer's income from boat shares and the monthly invoice handling charges. (Deft. Ex. 14, Schedules A, B-2, R. 233-235.) There was a resultant elimination of the taxpayer's surplus and the creation of a deficit in the amount of \$328.56. (Deft. Ex. 14, Schedule A, Line 8, R. 233.)¹

¹ On July 23, 1957, taxpayer sold to DeJean for their \$19,580.66 book value two trawlers the value of which was estimated to be \$50,000. (R. 198-200, 218.)

More significant than the existence or absence of corporate surplus or of a substantial net worth of the taxpayer is evidence of the taxpayer's capacity to raise enough money to forestall a levy upon its assets and financial ruin. In this regard, taxpayer was not necessarily faced with a requirement of paying the entire assessment of \$41,568.57 plus interest, or facing bankruptcy and liquidation. There is nothing to show that he attempted to pay the assessment for one taxable period³ while requesting deferral of collection for the other taxable periods involved until the legal issues could be litigated in a refund proceeding. It defies credulity to believe that the taxpayer, which was owed \$20,269.02 by the DeJean partnership (R. 151), could not have obtained \$2,000 from the partnership to pay the assessment due for one quarter.⁴

5. *The evidence on the question of employee status of the fishermen*

The issue of liability for social security and unemployment taxes in this case depends upon whether the captains and crews of respondent's fishing boats were its "employees" within the meaning of Sections 1426 and 1607 of the Internal Revenue Code of 1939 and of Sections 3121 and 3306 of the 1954 Code. Each of these sections specifically incorporates common law rules for determining status as an employee.

(a) The government relied upon the following evidence to justify an inference of an employer-employee status.

³ See *Flora v. United States*, 362 U.S. 145, 171, n. 37; *Steele v. United States*, 280 F.2d 89 (C.A. 8).

⁴ The assessments, by taxable quarters, are set out at page 5 of the printed record.

(i) The relationship between the respondent and the crews of the ships was not, in general, sporadic or of short duration. Several captains testified that they had plied the same trade, using respondent's vessels for 35, 20, and 15 years. (R. 156, 223-224, 263.)

(ii) Taxpayer maintained substantial power to control the activities of its crews. It could and would lease its ships to whom it pleased. (R. 34, 36-37.) There was evidence that respondent could control the quantity of ice taken on any trip and thus could control the duration of the trip. (R. 221, 264.) Taxpayer, as almost exclusive purchasing agent for each crew's catch, could control the type of fish sought. (R. 33, 37, 222-223, 244, 266.)

(iii) There was evidence that respondent intended to and on occasion did exercise its power of control over the ships' crews. Each leased ship almost invariably purchased its groceries, on credit, at a store owned by Leon Hall, the son-in-law of the president and principal stockholder of respondent. (R. 35, 64-65, 165-166, 181-182, 222, 245-246, 264.) The testimony of respondent's president strongly suggests that a captain's failure to buy from Leon Hall would be a relevant factor in consideration of whether he should be retained in respondent's fleet. (R. 65-66.) Fuel and ice were regularly purchased from respondent or a closely related seller, although there was testimony that at least the fuel could be obtained more cheaply elsewhere. (R. 76, 221, 254.) There was evidence that respondent would contact those of its ships which were radio-equipped and direct them either to return

or not to return to port on a particular day, depending upon the then current supply of shrimp on hand at the DeJean plant. (R. 58, 219, 221.) Other evidence of actual exercise of control was the testimony that the men had to obtain permission to sell their catch to anyone other than the taxpayer; that the men needed permission to go out in the boats when DeJean had no need of more fish; that the taxpayer sometimes dictated the nature of the catch; and that the price paid for the catch was in general unilaterally determined by respondent. (R. 163, 222-223, 238-240, 266.)

(iv) Finally, the parties themselves had at times described their relationship as that of an employer to an employee. During World War II taxpayer or DeJean or Elmer Williams applied for and obtained draft deferments for captains and crew members by representing that these men were employees. (R. 231.) On separate occasions two captains filled out "Master's Certificates of Service" for admission to the United States Marine Hospital at New Orleans. Each certificate indicated that the captain regarded himself as an employee. (Deft. Exs. 3, 8(a).) DeJean represented to the Federal Public Housing Authority that some of the fishermen were employees entitled to wages at specified rates. (Deft. Ex. 5, pp. 1-12.)

(b) The taxpayer, on the other hand, produced evidence that the captains were free to buy their provisions where they wished; that the captains hired and controlled their crews; that the captains chose their fishing grounds and methods; and that the crews

were not compelled to sell their catch exclusively to taxpayer and DeJean.

C. THE DECISIONS OF THE DISTRICT COURT AND OF THE COURT OF APPEALS

The district court found that the captains' regular purchase of supplies from the taxpayer or related sellers was due to the convenience, efficiency, and services of the sellers and not because of any "control, right of control or coercion" on the part of the taxpayer. (R. 276-277.) It found that the taxpayer neither exercised nor retained a power to control the methods of fishing and that the captains were free to sell their catch wherever they pleased. (R. 277.) The trial judge concluded that there was no employer-employee relationship between the taxpayer and the captains and crews of the ships involved. Upon the basis of this conclusion and its finding that (R. 279):

* * * if the levy had been made upon the assets of the corporation it would have wrecked the corporation and thrown it into bankruptcy, as it did not have and does not have assets with which to pay the taxes and not sufficient assets with which it could have negotiated a loan to pay the tax.

the court granted a permanent injunction restraining the collection of the contested unemployment and social security taxes. (R. 284.) The District Court did not find that the assessment was arbitrary and capricious; nor was there any record evidence to support such a finding.

The Court of Appeals affirmed. (R. 293.) Judge Rives, dissented (R. 293-298). He noted that the

holding of the majority was in direct conflict with the decision of the Eighth Circuit in *Kaus v. Huston*, 120 F. 2d 183, and that the rationale of *Miller v. Nut Margarine Co.*, 284 U.S. 498 (R. 296), "cannot be extended to bring within some supposedly implied exception cases like the present one without emasculating the prohibition" of Section 7421 of the 1954 Code against injunctions restraining the collection of taxes.

SUMMARY OF ARGUMENT

Section 7421(a) of the Internal Revenue Code of 1954 states, in clear and unmistakable terms, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." The twofold purpose of this prohibition—institution of a uniform system for judicial determination of the correctness of a tax assessment and protection of the government's paramount need of being able to collect its revenues without dependence upon a prior judicial adjudication—has been recognized by this Court in a number of cases for over a hundred years. Where Congress has been willing to allow an exception to the provisions of Section 7421(a), as in the case of Tax Court proceedings, it has expressly incorporated the exception into the statute.

In *Miller v. Nut Margarine Co.*, 284 U.S. 498, this Court, dealing with a unique factual situation which involved an assessment characterized by the Court as arbitrary and capricious, engrafted a narrow exception upon the broad and clear prohibition of the statute. The *Nut Margarine* exception requires the

existence of two factors: (1) an illegal exaction (p. 509) "in the guise of a tax," and (2) the presence of "special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence."

The requirement of an illegal exaction in the guise of a tax cannot be satisfied by a mere allegation or showing of a bona fide mistake of law or fact. If it could, Section 7421(a) would be of no force and effect and its purpose of requiring payment prior to resort to a uniform system of judicial determination of liability would be frustrated. This Court and the court of appeals have held that an assertion or showing of simple error of law or fact does not make a tax assessment "illegal" in the sense required to be enjoined.

In the present case neither court below purported to find any illegality in the assessment of tax beyond their determination on the merits that the taxpayer was not in fact liable for the taxes asserted. Moreover the court did not make and, indeed, the record would not support a finding of an arbitrary or capricious assessment. Since one of the two requirements necessary to bring the taxpayer within the *Nat Margarine* exception to Section 7421(a) was not satisfied, a suit to restrain the tax assessments could not properly be entertained and the judgment below must be reversed.

ARGUMENT

A. SECTION 7421(A) EXPLICITLY PROHIBITS SUITS TO ENJOIN THE ASSESSMENT OR COLLECTION OF ANY TAX

The single question presented is whether, under the facts and circumstances of this case, the district court

had jurisdiction to enjoin the collection of the social security and unemployment taxes involved, in light of the statutory prohibition contained in Section 7421(a) of the Internal Revenue Code of 1954, *supra*, p. 2.

That section states, in the clearest possible terms, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." The provision has been federal law, in substantially identical form, since 1867.^{*} It reflects a Congressional determination that the complexities of administering the revenue laws necessitate a uniform system for the review of asserted tax liabilities and that, in light of the government's paramount need promptly to secure its revenue, the proper remedy for contesting an assessment or collection is

^{*}Section 10 of the Act of March 2, 1867, 14 Stat. 471, amended Section 19 of the Act of July 13, 1866, 14 Stat. 93, by the addition of the phrase "And no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court." Section 19 set forth the conditions under which suits might be maintained for the refund of taxes alleged to have been erroneously assessed. In the Revised Statutes the phrase added in 1867 was modified slightly and became Section 3224: "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Section 3653(a) of the 1939 Code and Section 7421(a) of the 1954 Code are identical, except for the addition of provisions relating to cases pending before the Tax Court, not germane here. Cf. 28 U.S.C. 1341, whereby Congress has also prohibited restraint by the federal courts of the assessment or collection of any tax under state law where there is an adequate remedy at law in the state courts. For comment on the paucity of the legislative history of Section 3224, see Gorovitz, *Federal Tax Injunctions and the Standard Nut Cases*, 10 The Tax Magazine 446 (1932), and Note, 40 Harv. L. Rev. 109 (1933).

an action for recovery of the payment of the tax. (See *Allen v. Regents*, 304 U.S. 439, 456 (concurring opinion), rehearing denied, 304 U.S. 580; *Bull v. United States*, 295 U.S. 247, 250-60; *State Railroad Tax Cases*, 92 U.S. 575; *Phillips v. Commissioner*, 283 U.S. 589, 596; *Flora v. United States*, 362 U.S. 145.)

As early as 1875, this Court in *Chenetham v. United States*, 92 U.S. 85, 89, clearly recognized the prohibition against enjoining the assessment or collection of a tax as an essential governmental safeguard:

If there existed in the courts, State or National, any general power of impeding or controlling the collection of taxes; or relieving the hardship incident to taxation, the very existence of the government might be placed in the power of a hostile judiciary. . . . While a free course of remonstrance and appeal is allowed within the departments before the money is finally exacted, the general government has wisely made the payment of the tax claimed, whether of customs or of internal revenue, a condition precedent to a resort to the courts by the party against whom the tax is assessed. . . .

To the extent that Congress deemed it necessary to limit the general prohibition against enjoining the assessment or collection of any tax, it provided an express statutory exception to the clear command of Section 7421(a). By its own terms, that section is inapplicable where the Commissioner has determined a deficiency of income, estate, or gift taxes (under Section 6212 (a) and (c) of the 1954 Code), the taxpayer has filed a timely petition for redetermination of such deficiency (as provided in Section

6213(a)') and that petition is pending before the Tax Court. In such situations, no assessment or collection of tax is to be made until a final determination is rendered by the Tax Court, and Section 6213(a) explicitly provides that the making of an assessment or levy prior thereto may be enjoined.' Thus, with respect to income, estate, and gift taxes, Congress has explicitly created a special statutory right to judicial determination of liability prior to payment.

In sharp contrast, Congress has made no exception to the government's right to collect social security and unemployment taxes before issues of liability with respect thereto are adjudicated. The provisions relating to those taxes—here involved—have been incorporated in Subtitle C of the 1954 Code,* and are not covered by the exception of Section 6213(a). See *Enochs v. Green*, 270 F. 2d 558 (C.A. 5th). Section 7421(a) applies with full force, therefore, to bar any "suit for the purpose of restraining the assessment or collection" of the taxes in the instant case.

* Section 6213(a) provides in pertinent part:

" * * * no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such [90-day] notice has been mailed to the taxpayer * * *. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court."

† However, where the Secretary of the Treasury or his delegates believe that the assessment or collection of a deficiency will be jeopardized by delay, Section 6861 commands that he shall immediately assess and collect the tax, notwithstanding the provisions of Section 6213(a).

* See Sections 3101 and 3301 of the 1954 Code.

B. MILLER V. NUT MARGARINE CO., 284 U.S. 498, RECOGNIZED A NARROWLY LIMITED EXCEPTION FOR INJUNCTIVE ACTIONS WHEN A COURT IS PRESENTED WITH BOTH EXTRAORDINARY CIRCUMSTANCES AND AN ILLEGAL EXACTION IN THE GUISE OF A TAX

In addition to the statutory exception of Sections 6212 and 6213, this Court has engrafted a judicial exception to the plain words of Section 7421(a). In *Miller v. Nut Margarine Co.*, 284 U.S. 498, this Court was presented with the following facts. The taxpayer sought an injunction restraining the Collector from collecting any tax under the Oleomargarine Act.* Three prior district court adjudications had declared identical products to be nontaxable, and a Treasury Decision had been published to the same effect. Most important, the taxpayer had been advised by letter from the Collector that its product would not be taxed.* Also, the Collector had acquiesced in other injunction proceedings contesting similar attempts to impose tax, and had made no effort to tax other identical products being marketed. Relying upon all of the foregoing, the company commenced manufacture and sale. About eighteen months thereafter, the Collector (p. 505) "demanded and threatened to collect" a tax of 10¢ per pound upon the product. If required to pay the tax, the company's loss would have amounted to 7¢ per pound; furthermore, the company had already sold so much of its product that payment of the tax would have destroyed its enterprise.

* Act of August 2, 1886, 24 Stat. 209, as amended by Act of May 9, 1902, 32 Stat. 193.

In these circumstances, this Court found (pp. 510-511) that the Collector's determination of tax liability was "arbitrary and capricious" (p. 508); that a "valid oleomargarine tax could by no legal possibility have been assessed"; and the discrimination shown conflicted "with the principle underlying the constitutional provision directing that excises laid by Congress shall be uniform throughout the United States"; and that it required "no elaboration of the facts found to show that the enforcement of the Act against respondent would be arbitrary and oppressive."

On these facts, which the Seventh Circuit has described as manifesting "administrative caprice,"¹⁰ this Court held that the statutory prohibition against suits to restrain an assessment or collection was subject to judicial modification where two requirements are met (p. 509): (1) there is a showing of "the illegality of an exaction in the guise of a tax"; and (2) there are present "special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, * * *."¹¹

C. THE REQUIREMENT OF "AN ILLEGAL EXACTION IN THE GUISE OF A TAX" CANNOT BE SATISFIED BY A MERE ALLEGATION OR SHOWING OF A BONA FIDE MISTAKE OF LAW OR FACT

The boundaries of an "illegal exaction" sufficient, if accompanied by extraordinary circumstances, to over-

¹⁰ *Homan Mfg. Co. v. Long*, 242 F. 2d 645, 653.

¹¹ Justices Stone and Brandeis dissented on the ground that the statute precluded injunctive relief "whatever the equities alleged."

come the prohibition of Section 7421(a) are not susceptible of precise definition. It is, however, entirely clear that if the statutory prohibition is to have any effective content the requirement of illegality can not be satisfied by a mere showing of an error of law or fact. Questions of the correctness of the assessment or collection of any tax are the intended routine fare of the statutory system for the review of tax liabilities. The very purpose of the enactment of Section 7421(a) was to assure the uniform operation of the provisions requiring payment and then a civil action for a refund under Section 7422 to contest tax liability. If, on a request for injunction, the assessment or collection of a tax could be scrutinized on its merits on the ground that an erroneous assessment is an "illegal exaction," then the government would in every case be required to await the determination of judicial proceedings to collect the tax it asserts is due, and there would be no case in which the taxpayer is made to rely upon the uniform statutory procedure for contesting the validity of a tax assessment. In short, Section 7421(a) would be of no force and effect, for the remaining requirement of hardship making the remedy at law inadequate would add nothing to the general requirements of equity jurisdiction.

This Court and the courts of appeals have always recognized that far more must be shown than the error of a tax assessment if the prohibition of Section 7421(a) or its predecessors are to be avoided. Dealing with R.S. 3224, a predecessor of Section 7421(a), this Court, in *Snyder v. Marks*, 109 U.S. 189, 192, described a "tax" as—

* * * that which is in a condition to be collected as a tax, and is claimed by the proper public officers to be a tax, *although on the other side it is alleged to have been erroneously or illegally assessed.* * * * [Emphasis supplied.]

See also *Dodge v. Osborn*, 240 U.S. 118; *Phillips v. Commissioner*, *supra*. In the *Nut Margarine* case, where injunctive relief was granted, the Court spoke of "arbitrary and oppressive" enforcement, of an "arbitrary and capricious" determination, of a tax which "could by no legal possibility have been assessed," and of "discrimination" on the part of the Collector. All these terms are descriptive of administrative determinations for which no legal basis exists—determinations which on their face are in violation of law. The very words—"arbitrary," "capricious," "discrimination"—have definite legal connotation and suggest results reached through administrative action which itself exceeds administrative power, rather than, simply erroneous results reached by the administrator while working within the proper limitations of his role.

In *Kaus v. Huston*, 120 F. 2d 183, a case closely analogous on its facts to this, where the taxpayer contended that social security and unemployment taxes could not be legally assessed against him because he was merely the lessor of taxicabs to independent operators rather than the employer of the drivers, the Eighth Circuit denied injunctive relief, stating (120 F. 2d at 185):

It is true that where a complainant demonstrates that what purports to be a tax is merely

an exaction in the guise of a tax and that there are special and extraordinary circumstances which bring the case under some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collection of the pseudo-tax. *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 509, 52 S. Ct. 260, 76 L. Ed. 422. The validity of the taxing act under which the assessments against appellant were made has been sustained. * * * The assessments are for taxes, and not for exactions in the guise of taxes. The appellant may not owe them, but that does not change their nature, nor is nonliability a special or extraordinary circumstance. This case presents the ordinary situation of a taxpayer resisting payment of taxes which he believes that he does not owe.¹² * * *

D. SINCE THERE WAS NO SHOWING OF AN "ILLEGAL EXACTION" AND NEITHER COURT BELOW FOUND MORE THAN AN ERRONEOUS ASSESSMENT OF A TAX, SECTION 7421 (A) OF THE INTERNAL REVENUE CODE OF 1954 DEPRIVED THE COURTS BELOW OF JURISDICTION TO ENJOIN THE ASSESSMENT OR COLLECTION OF THE TAXES IN ISSUE

There is no doubt that in the present case an erroneous standard was applied to the "illegality" requirement of the *Nut Margarine* case in allowing the restraint of the collection. Both the district court and the court of appeals granted the injunction on the ground that, under the facts of the case, the Com-

¹² See also *Missouri Valley Intercol. Ath. Ass'n. v. Bookwalter*, 276 F. 2d 365 (C.A. 8); *Mensik v. Long*, 261 F. 2d 45 (C.A. 7); and *Homan Mfg. Co. v. Long*, 242 F. 2d 645 (C.A. 7).

missioner had incorrectly asserted the existence of tax liability. There was no finding of administrative caprice, nor of an arbitrary or discriminatory assertion of tax liability where none could possibly exist. Nor was there any doubt expressed concerning the good faith of the taxing officials or as to the procedural regularity of the administrative action taken.

The District Judge clearly stated why he found the asserted liability to be "illegal" (R. 280):

I find as a fact that the relationship of employer and employee as defined by the Social Security Act did not exist and does not exist between the corporation and the captains of the boats and the crewmen, and that the tax was illegally and unlawfully levied, * * *

He summarized, "If the relationship of employer-employee did not exist, then the levy was unlawful"—i.e., the levy could be enjoined. (R. 273.)

The opinion of the Court of Appeals, in affirming the grant of the injunction, also plainly indicates that the requisite "illegal action" was grounded on nothing more than the court's determination that, under the facts of the case, the Commissioner had made an erroneous assessment. Judge Cameron, speaking for the majority, stated (R. 286-287) that " * * * the question underlying disposition of the whole case, that is, whether the fishermen were employees of the taxpayer corporation, was one essentially to be resolved from the facts as developed from the large number of witnesses the court heard." Likewise, Judge Rives, dissenting, described the issue deemed controlling by the majority as "closely and

hotly litigated purely as a question of fact." (R. 297.)

It is equally certain that there was no basis in the record for a finding of an abuse of the District Director's administrative powers. The evidence produced before the trial judge and summarized in the Statement (*supra*, pp. 10-12) makes clear that the District Director could reasonably find and conclude: (1) that the taxpayer retained as much control of the fishermen's activities as was practical considering the necessity of substantial independence of a ship at sea; (2) that the taxpayer exercised or would have exercised this control whenever necessary to assure that supplies were purchased from it or related sellers, that the catch was sold only to it, and that only fish which taxpayer or DeJean could use were caught; and (3) that this much control of persons who regularly used taxpayer's equipment over long periods of time to furnish a service necessary to taxpayer's business indicated that the fishermen were in fact taxpayer's employees. Indeed in another series of cases involving an analogous fishing operation the captains and crew members were found to be employees after a jury trial.¹¹ If these conclusions would have been warranted on the record before the district court, it cannot be asserted that the Commissioner's assessments, based on similar con-

¹¹ *R. E. Clegg v. United States*, Nos. 456, 457, decided January 10, 1962 (S.D. Tex.); *Johnson R. Clegg v. United States*, No. 458, decided January 10, 1962 (S.D. Tex.); *Clegg Shrimp Co. v. United States*, No. 459, decided January 10, 1962 (S.D. Tex.).

clusions from similar evidence, were even unreasonable, much less arbitrary or capricious.¹⁴

Since the record will not sustain a determination that the District Director's assessments represented an abuse of his administrative powers and since no such determination was in fact made by the courts below, the present case does not satisfy one of the two requirements of the *Nut Margarine* case—that the assessment must constitute not merely error but an illegal exaction “in the guise of a tax”. Not having brought itself within the *Nut Margarine* exception to Section 7421(a), taxpayer is properly subject to the clear prohibition of that section that “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.” Both courts below were without jurisdiction to entertain the taxpayer's suit and the judgment below must be reversed.

E. THE GRANTING OF A PRELIMINARY AND A PERMANENT INJUNCTION AGAINST THE ASSESSMENT OR COLLECTION OF TAXES WHERE ONLY A POSSIBLE ERROR IN THE ASSESSMENT IS ALLEGED OR SHOWN UNDERMINES THE PURPOSES OF SECTION 7421(a)

The judicial proceedings in the present case were initiated with the filing of a complaint in the district court more than four and one-half years ago. A preliminary injunction was issued immediately there—

¹⁴ Prior to making the assessments, the Internal Revenue Service had interrogated numerous captains and crew members who worked aboard taxpayer's boats and had examined taxpayer's books and records (R. 231-232). Thereafter, the Internal Revenue Service reconsidered and upheld the assessments in connection with taxpayer's claims for abatement (R. 5).

after and was lifted only when it was replaced by a permanent injunction. Even if the government had won its case in the district court, it would have been delayed almost two years in the collection of its revenue by the preliminary injunction. If in that circumstance a stay had been granted pending appeal or if the government had first won its case on the merits in the appellate court, the government would have been delayed three and three-quarters years in the collection of revenue.

Congress has deliberately considered the question as to which party should bear the inevitable delays of judicial determination of tax liability. It has chosen between the risks of requiring the taxpayer to rely on the government's administrative assessment of tax liability pending judicial determination and the risks of requiring the government to rely on the judgment of district courts acting on application for preliminary injunction pending final judicial determination of tax liability. For almost one hundred years it has placed the burden of delay upon the taxpayer in unequivocal terms. The power of Congress to make this determination and to have it fully respected by the federal courts continues to be an essential implement of Congress' broader power to assure the nation's fiscal responsibility.

The *Nut Margarine* exception to the plain wording of Section 7421(a) and its predecessors is consistent with the purposes of the statute only so long as it continues to require a tax which "could by no legal possibility have been assessed" and an administrative determination which is manifestly "arbitrary and capricious"—in sum, so long as what is enjoined can

fairly be said to be not what would ordinarily be called a tax assessment or tax collection but a flagrant abuse of administrative powers which is merely labeled "tax collection" for purposes of deception.

Finally, this substantive standard will not in itself guarantee that Section 7421(a) will have its intended effect unless it is applied sympathetically at the earliest possible stages of proceedings, particularly in the district court's action on an application for a preliminary injunction. Even if the district court had applied the proper standards of Section 7421(a) after a complete trial in the present case, the government would have been subjected to an unnecessary and fruitless trial and would have been delayed almost two years in the collection of a tax assessment which Congress has determined the government may collect and use pending judicial resolution of any *bona fide* disputes as to liability.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed, and the case remanded with instructions to dismiss the complaint.

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MARCH 1962.

CLERK
SUPREME COURT, U. S.

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FILED

~~APR 14~~ 1962

JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM—1961

No. 493

J. L. ENOCHS, DISTRICT DIRECTOR OF
INTERNAL REVENUE,

Petitioner,

versus

WILLIAMS PACKING & NAVIGATION CO., INC.,
Respondent.

BRIEF FOR THE RESPONDENT.

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J. L. ENOCHS, DISTRICT DIRECTOR OF
INTERNAL REVENUE,

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WILLIAMS PACKING & NAVIGATION CO., INC.,
Respondent.

BRIEF FOR THE RESPONDENT.

QUESTION PRESENTED.

WHETHER UNDER THIS COURT'S DECISION IN *MILLER V. NUT MARGARINE COMPANY*, 284 U. S. 498, THE DISTRICT COURT HAD JURISDICTION TO ENTERTAIN A SUIT TO RESTRAIN THE COLLECTION OF TAXES ALLEGEDLY ERRONEOUSLY ASSESSED DESPITE THE PROHIBITION OF SECTION 7421(a) OF THE INTERNAL REVENUE CODE OF 1954 WHERE THE FOLLOWING EXISTED:

(1) At no time after the adoption of the statutes imposing Social Security and unemployment taxes did the government contend that the respondent was liable for the taxes, and

That the first contention made with respect to the relationship between the fishermen and packers was that the captains and members of the crew were not the employees of the persons to whom they sold their product.

(2) Consistent with the government's contention that the relationship of the packers and captains-crew members was not that of employer-employee, the government did not resist the issuance of a temporary restraining order in this case.

(3) Payment of the assessment would have wrecked the corporation and thrown it into bankruptcy.

(4) There was no clear adequate or plain remedy at law available to the plaintiff.

(5) The delay in the trial of the case was caused by the government.

(6) The plaintiff was not a taxpayer.

STATEMENT.

A. The Initiation of the Present Proceedings.

The respondent would add to the statement of the petitioner that at the hearing on the preliminary injunction the attorneys representing the government had been instructed to appear and not object to the issuance, nor

could they consent to it. Those instructions came directly from Washington, and they were to the effect that the U. S. attorneys were not to object to the restraining order in the case. (R. pp. 26, 27, 28.)

The delay in the trial of the case was occasioned by the government. The decree and injunction was signed on September 9, 1957. (R. p. 7.) The government's answer was not filed until May 29, 1958. (R. p. 7.) In June of 1958, the case was continued by consent of both parties with the idea that an agreed stipulation of facts could be entered. (R. p. 27.) A stipulation of facts was filed with the government for its approval, and the stipulation was held in abeyance for "a long, long time." (R. p. 27.) Shortly before Christmas in 1958 plaintiff's counsel advised the Court that no agreement could be reached with respect to the stipulation, and it was then that the Court set the case for trial. (R. p. 27.)

The preliminary injunction issued in *Miller v. Nut Margarine* made no finding that the Director's assessment was arbitrary, capricious or otherwise illegal.

B. The Evidence Produced at the Trial.

Respondent adds to the summary of the evidence produced at the trial the following:

- 1. Williams Packing & Navigation Co., Inc., and DeJean Packing Company.**

The corporation was engaged only in the production of raw material and sold practically all of its products to the DeJean Packing Company. At the time of the filing of the suit it owned two vessels worth approxi-

mately \$21,000 or \$22,000, and its only assets of any value were the leasehold interest it had upon boats and the good will and value of its right to fish in the waters of Louisiana. (Opinion of the lower Court, R. p. 279.) The corporation's charter had value because it gave it valuable rights to fish in Louisiana. (Opinion of the lower Court, R. p. 280.) The corporation was engaged in business since its formation in 1944. (R. p. 44.) "It was not organized for the purpose of evading the payment of any taxes of any type and at the time of its incorporation as well - - - (at the time of the trial its purpose was to engage) in a legitimate business which it has done." (R. p. 274, opinion of the lower Court.)

The respondent and the DeJean Packing Company are engaged in different business enterprises, the former being in the business of leasing or chartering shrimp boats and purchasing raw seafood products. The latter is in the business of processing seafood. (Opinion of the Court, R. pp. 277, 279.)

The Court found as a fact that the DeJean Packing Company was a completely separate and independent entity from that of the petitioner and the DeJean Packing Company was under no duty or requirement of law to pay the tax of the corporation. (R. p. 279.)

2. Respondent's Methods of Operation.

The respondent takes exception to the government's position that the value of the catch was fixed by prices which it determined. The record shows that the captains and members of the crew who had belonged to the Gulf Coast Shrimpers and Oystermen's Associa-

tion had been engaged in the fixing of prices, and it was for that reason that the government sought and obtained a conviction under the Sherman Anti-Trust Act in the union. Subsequent to that conviction prices were fixed on supply and demand. (R. p. 38.)

3. The Financial Relationship Between Respondent and DeJean.

We take exception to the petitioner's statement that "Frieburger admitted that it was within the scope of his employment to determine how much money should be paid to the respondent." For we think that the fair inference to be drawn from that testimony is that the determination was made from the books of the corporation or from the partnership and was based upon the customs which had grown up over the years.

4. Respondent's Financial Condition.

The record shows that the final determination of the alleged tax liability of the respondent was not made until August 30, 1957. (Exhibit "A" to Complaint, R. p. 5.) The corporation lost money in 1956, and, by June 30 of 1957, some months before the final determination of the assessment, the corporation was a deficit corporation. (Defendant's Exhibit 14, Schedule A, line 8, R. p. 233.) There is no showing that the surplus which the corporation once enjoyed was intentionally reduced. We take very definite exception to the government's conclusion contained in its statement of the case found in page 9 of its brief to the effect that the respondent could have litigated the issues by the payment of \$2,000 and take further exception to the construction of the case of *Flora*

v. U. S., 262 U. S. 145, 171, Footnote 37, and to *Steel v. U. S.*, 280 Fed. (2d) 89 (C. A. 8). This inferential argument is contained in the statement of the case and is not developed in its summary of the argument or in the argument in chief.

5. The Evidence on the Question of Employee Status of Fishermen.

We would add to the government's summary of the evidence relied upon by the petitioner the following: Without exception the witnesses for the government and for the respondent all stated that in securing a crew to operate the vessels the captain of the vessel to whom the boat had been entrusted had the sole discretion to hire whom he pleased, fire the crew, direct and control them as he saw fit. (R. pp. 157, 172, 182, 206, 226, 261.) The captains of the vessels determined how the boats were rigged and the method of rigging the boats varied from captain to captain. (R. p. 172.) The provisions such as food, fuel and ice were ordered by the captain and crew without restriction as to quantity. (R. pp. 158, 173.) The captain and members of the crew built up an equity in the rig of the boat and could draw it out or apply the equity towards additional improvements on the rig. (R. p. 158.) If the captain and crew desired a radio on the boat, they obtained an equity in the radio, as it was paid for on the share basis. (R. p. 159.) In one instance a captain who had owned his own boat and sold his products to the respondent sold the boat to the respondent and continued to operate the boat. The method of operation after he sold it was no different than before. (R. p. 157.) Several of the government's witnesses testified to isolated inci-

dences which its attorneys believed tended to show control on the part of the respondent over the captains and members of the crew. The government sought to establish that Williams Packing & Navigation Co., Inc., exercised control by restricting the amount of ice the captain and crew could order. That testimony was drawn from George Williams (R. p. 244), who stated that food at the Hall Grocery was more expensive than at other places (R. p. 245) and that the captain acted in the capacity of a foreman for the company. It was shown that this witness had engaged in a bitter strike against the respondent not long before the trial of this case (R. p. 247) and had written a letter in which he suggested to the United States Department of Justice that the U. S. attorney in Mississippi should not handle the trial of this case. (R. p. 250.) Another government witness, Wilfred Borque, had a suit pending against respondent and DeJean Packing Company and had engaged in the same strike in which the witness George Williams had participated. (R. p. 258.)

SUMMARY OF ARGUMENT.

While Section 7421(a) of the Internal Revenue Code 1954 prohibits the restraining of an assessment or collection of tax, there is a well-recognized exception to that statute. The respondent contends first that it operated for a considerable period of time during which the government never contended that the captains and fishermen were its employees and that the first contention made with respect to the relationship of the fishermen was that they were not the employees of the persons to whom they sold their products. Second, that the government acquiesced, or at least did not resist, the issuance of an

injunction in this case. Third, that the amount of the assessment was so large as to be ruinous on the respondent had it been required to pay first and sue later. Fourth, respondent had no clear, adequate or plain remedy at law, there being no statute, regulation or judicial determination at the time of the filing of the suit which permitted the respondent to litigate the issues upon payment of less than the full amount of the assessment. Fifth, the delay in the trial of the case is caused by the government, which was deprived of nothing to which it was entitled. Sixth, the plaintiff was not a taxpayer.

It is further submitted that these equitable considerations bring this case within the *rationale* of *Miller v. Nut Margarine* and Court of Appeals cases which have considered *Miller v. Nut Margarine* in cases involving the legality of assessments of FICA and FUTA taxes.

It is finally argued that the petitioner's authority cited in its brief is not controlling in the disposition of this case.

ARGUMENT.

I.

**At No Time After the Adoption of the Statutes
Imposing Social Security and Unemployment Taxes
Did the Government Contend that the Respondent
Was Liable for the Taxes.**

The respondent was chartered in 1944 and operated approximately ten¹ years under the assumption that

¹ *Gulf Coast Shrimpers & Oyster Assn. v. United States* (C. A. 5), 236 Fed. (2d) 658, cert. denied 352 U. S. 927. The action of the union violative of the Sherman Anti-Trust Act took place during 1950-53. The date of the conviction does not appear in the report, but it had to be subsequent to 1953.

it was not the employer of the captains and members of the crew before any contention was made by the government with respect to the relationship. When the government chose to enforce the provisions of the Sherman Anti-Trust Act² against fishermen's union, it was met at the outset by the conclusion that the members of the union were the employees of the persons to whom they sold their catch. In pursuing the indictment of the union the government strongly and successfully urged that the employer-employee relationship did not exist.

Gulf Coast Shrimpers and Oystermen's Assn. was a case generating considerable interest in the fishing industry on the Mississippi Gulf Coast.³ While it may not have determined the precise relationship of each of the union members to the packers to whom the catch was sold, it represented an effort on the part of the government to subject the union to the criminal sanctions of the Sherman Act. That effort would have failed had the proof established that the union members were the employees of the packers.

Thus, when the assessment was made against the respondent, the government was taking a position inconsistent from that urged in the anti-trust suit. To a large extent the respondent was in the same position as was the Nut Margarine Company when the assessment was levied upon it. Both felt that the government's assessment was inconsistent with its prior action. Such inconsistent actions were considered by this Court to be material factors in *Nut Margarine*.

² 15 USC Sect. 4.

³ Elmer Williams, President of respondent, testified before the grand jury in that case. (R. p. 56).

II.

**Consistent With the Government's Contention That
the Relationship of the Packers and Captains and
Crew Members Was Not That of Employer-
Employee, the Government Did Not Resist the
Issuance of a Temporary Restraining Order
in This Case.**

The record shows that when the government through its attorneys appeared at the hearing on the application for a temporary injunction, the government through its representatives did not consent to the issuance of the injunction, and did not resist it. The attorneys appearing for the government were under instruction from the Department of Justice in Washington, D. C., to proceed in that manner. (R. p. 28.) We think that this implied consent of the government to the issuance of the temporary injunction is a complete and adequate answer to the general argument⁴ that the granting of the injunction undermines the purposes of Section 7421 (a), and to the specific argument that the Section 7421 (a) will not have its intended effect unless applied at the earliest possible stages of proceedings, "... particularly in the district Court's action on the application for a preliminary injunction."⁵

If the effect of the section was to be applied at the time the matter was presented to the lower Court, the government should have resisted the application.

Of greater significance is the fact that the government argues that the lower Court had no jurisdiction to try the case; and this Court should reverse the lower Court

⁴ Proposition E, page 25, petitioner's brief.

⁵ Petitioner's brief, first full paragraph p. 27.

with instruction to dismiss the complaint. As we read that argument, the government is contending that the lower Court had no jurisdiction or power to entertain the suit, that the suit should have been summarily dismissed upon its presentation; that the Court had no power to determine the ultimate and controlling fact that is: whether as a matter of fact the respondent was a taxpayer within the meaning of the subject statutes.

At the threshold of this case, when the Court was looking to the government for an expression of its position, the Court was advised that no resistance would be offered. Under those circumstances the Court issued the temporary injunction. It had jurisdiction of the parties, and of the subject matter.⁶

III.

Payment of the Assessment Would Have Wrecked the Corporation and Thrown It Into Bankruptcy.

The lower Court found as a fact that the corporation had no assets with which to pay the assessment, and that if it had been required to pay the assessment would have been ruinous. (R. p. 279.) The government does not argue that the Court's finding in that respect is errone-

⁶ In *Miller v. Nut Margarine Co.*, 284 U. S. 498, the government urged reversal on the grounds that the court had no jurisdiction to issue an injunction, being prohibited sect. 3324, USC title 26, sect. 154, the statute then prohibiting the issuance of an injunction. In reaching the conclusion which it did, this court necessarily resolved that contention against the government. The elements of jurisdiction have been declared to be (1) The court must have cognizance of the class of cases to which the one to be adjudged belongs; (2) The proper parties must be present; (3) The point to be decided must be in substance and effect within the issue. *Noxon Chemical Products Co. v. Lockie*, 39 Fed. (2d) 318 (C. C. A. 3) cert. denied 282 U. S. 841.

ous, and it must be accepted as a fact. Therefore, we are not confronted with mere hardship in the payment of the tax, but an assessment against respondent which would have destroyed its very existence. Such a situation was considered special and extraordinary circumstance in *Miller v. Nut Margariné Co.*⁷

IV.

There Was No Clear, Adequate Or Speedy Remedy at Law Available to the Plaintiff.

Accepting as a fact that the respondent was unable to pay the assessment, and did not have assets on which it could borrow the money to pay the assessment, it was without a legal remedy. We are in agreement with the government's statement that "... Congress has made no exception to the government's right to collect Social Security and unemployment taxes before issues of liability with respect thereto are adjudicated."⁸ Congress has provided no remedy in tax court by which the liability for Social Security and unemployment taxes can be litigated without the necessity of payment of the assessment. The only statutory remedy is to pay first and then litigate. The government suggests in its statement of the case that the respondent could pay a single quarter, thus avoiding the ruinous aspects of the assessment, file a claim for refund and, upon it being rejected, sue for recovery. The government does not develop this

⁷ 284 U. S. 498, 510. It requires no elaboration of the facts found to show that the enforcement of the Act against respondent would be arbitrary and oppressive, would destroy its business, ruin it financially and inflict loss for which it would have no remedy at law.

⁸ Petitioner's brief, middle of page 17.

theory in its argument. In fact, the suggestion that less than the full amount could be paid is not consistent with its argument that the government was delayed "... almost two years in the collection of a tax assessment which Congress has determined the government may **collect and use** pending judicial resolution of any bona fide disputes as to liability." (Emphasis added; petitioner's brief p. 27.)

Since the government has failed to press the theory of the divisible nature of Social Security and unemployment taxes, it would seem that this is not a serious question in this case. The correctness of this assumption is emphasized from a reading of the cases cited in support of the theory.

(1) The *Flora* case on rehearing held that in income taxes the taxpayer must pay the whole assessment before he is free to litigate the liability in district Court. It is evident that the government is not relying on the *Flora* case because it holds exactly opposite to what the government contends. What the government is relying on is a footnote in the opinion of the Court on rehearing. That footnote occupies almost four full columns, cites many cases and is as long and complex as a reported decision. In it the Court undertakes to distinguish certain cases cited by the petitioner and groups those cases in blocks from (a) to (e). It is very difficult to understand why the government has referred this Court to that footnote. If there were some clear-cut statement in it to the effect that the respondent had such a remedy as suggested by the government, then we would think that counsel for the government would have told the Court of its

location or which of the some thirty-two cases cited in the footnote give the remotest comfort to the government. The only possible connection between the government's theory and the footnote is a statement of the Court which reads:

"(b) A number of the cited cases involved excise taxes. The government suggests—and we agree—that excise tax deficiencies may be divisible into a tax on each transaction or event, and therefore present an entirely different problem with respect to the full-payment rule."

Addressing ourselves now to the weight to be given the footnote, it is quite evident that the cases grouped under the category (b) are no authority for the theory that the taxpayer could pay part of the assessment and litigate all of the issues, as opposed to the holding in *Flora* that the taxpayer must pay first and sue later.

In the first place, the only cases on which the Court and government agreed involved suits in district Court for the refund of excise taxes. We need not cite authority for the rule that the tax court has no jurisdiction to entertain matters concerning such excise taxes as cabaret tax, nor does the tax court have jurisdiction involving Social Security taxes. So it is that a taxpayer against whom there has been rendered a deficiency assessment for excise taxes or Social Security taxes does not have the choice of litigating in the tax court without paying or paying the tax and subsequently litigating in district Court. In *Jones v. Fox*, 162 F. Supp. 449 (cited in the subject footnote), the Court discussed the *Flora*

case and the point under discussion, relating the reasons why it is right and proper that in excise tax cases the taxpayer may pay less than the full assessment and litigate the factual issues. The Court quoted the following language found in *Friebele v. U. S.*, D. C. N. J., 1937, 20 F. Supp. 492, 294:

"Income taxes and estate taxes flow from calculations involving complicated considerations of credits, exemptions, etc. The resulting tax has been influenced by and reflects these considerations. They are not naturally separable as in the case of the stamp tax. It is a wise law that governs their prepayment before suit can be brought. Otherwise, the power of collection of taxes would be continuously impeded and rendered practically useless. But in the case of these separable items the issue is clear-cut. There can be no complicated questions of credits, exemptions and the like. It is simply an issue of whether or not the stamp should be applied and in what amount."

The controlling consideration is the divisible nature of the tax. At no time during the trial of this case did the government suggest in its pleadings or as a defense to the issuance of the injunction that the respondent could divide the assessment of \$41,568.57. As a practical matter it was impossible for the respondent to make an accurate estimate of the amount due for a quarter for one or more fishermen. Consider these complicating factors: First, the captain of the vessel received a check for the catch after deducting the boat and rig shares. The respondent did not always know the personnel constitut-

ing the crew, nor did it have any control or wish to control the distribution of the net proceeds realized from the sale of the catch. Assuming that the boats were operated by a crew averaging one captain and two crew members, it is apparent that two-thirds of respondent's so-called employees might draw their so-called wages in a variety of percentages, depending upon the agreement they had with their captain. Next is the problem of "brokers." If a captain and crew had one or more brokers, their share of wages might not be known until the season was completed. And, finally, we have the problem of whether the share of the rig earned by the captain and crew was to be treated as wages, and, if so, how it was to be divided.

Furthermore, this remedy, if it exists, is not plain. The government can shift its position according to the special circumstances of the case. It can contend in those cases where partial payment is made that the Court has no jurisdiction, *Jones v. Fox, supra*, or where faced with the possibility of an injunction can argue that the respondent could pay a fractional part of the assessment and litigate the issues. We are directed to no rule, regulation or decision spelling out the remedy in cases such as this. That the so-called remedy to pay less than the full amount is not plain or even exists is further demonstrated by the other case¹⁰ cited by the government. There the plaintiffs sought to litigate the liability of penalties assessed against them as officers of a corporation for willfully failing to pay over to the Internal Revenue Service the withholdings of income taxes and Social Security taxes made by the corporation from the wages of its employees. The plaintiffs paid fifty dollars to the IRS and thereafter

¹⁰ *Steele v. U. S.* 280 Fed. (2d) 89 (C. A. 8).

brought suit in the district Court for refund. Relying on the first *Flora* decision,¹¹ the Court sustained the government's motion to dismiss. Plaintiffs appealed to the Court of Appeals, and during the interim this Court reconsidered *Flora* and entered in its opinion on rehearing.¹² The Court accepted the stipulation of the parties, wherein they agreed that the full payment rule is not applicable to an assessment of divisible taxes. We respectfully submit that neither *Flora*, footnotes 37 and 38 in *Flora*, nor *Steele* held that Social Security and unemployment taxes levied under the circumstances existing in this case were of a divisible nature. It is clear that at the time this suit was filed the respondent had two alternatives: it could seek an injunction or it could permit the government to exact a payment of \$41,568.57 in the guise of a tax and thereby ruin the taxpayer financially.

V.

The Delay in the Trial of the Case Was Caused by the Government and Worked No Hardship on the Government.

As an equitable consideration, it was the respondent which pressed for a trial and the government which delayed the hearing on the merits. The temporary injunction was issued in September of 1957. The government did not file its answer when due, but waited some seven or eight months to file its responsive pleading. After the case was at issue, the plaintiff sought to obtain a trial, but it appeared that the government might stipulate the facts. A stipulation was prepared and submitted, and

¹¹ 357 U. S. 63.

¹² 362 U. S. 145, footnotes 37 and 38 were the basis for the court of appeal's disposition of *Steele v. U. S.* *supra*.

several months elapsed, during which the government was presumably attempting to determine if it could stipulate. When it became evident that the stipulation was not acceptable, the plaintiff pressed for a trial. From the time the temporary injunction was obtained over a year elapsed before the respondent could obtain an expression from the government as to whether and how the case would be tried. After the trial, a busy district judge rendered his opinion without undue delay, and thereafter such delay that has been occasioned in the final disposition of this case was a result of the government's appeals.

The government complains that it was deprived of the use of respondent's money during the period it took this case to reach this Court. The validity of this argument is difficult to grasp. First, this appeal is confined to the very narrow question of whether the lower Court had jurisdiction to enter the injunction. There is no complaint made here that the lower Court's conclusion with respect to the relationship of the respondent to the captains and fishermen was clearly erroneous. Judge Rives in his dissent did not touch on that point, confining his dissent to the procedural question surrounding the right to injunctive relief. Therefore, it must be taken as admitted that the respondent was not liable for the taxes assessed by the government and must follow in addition that the government was deprived of nothing to which it was entitled.

These considerations are of vital importance in this case. First, we are dealing with equitable consideration, the exact boundaries of which were not defined in *Miller v. Nut Margarine*, but *Miller* stands for the proposition

that though the sovereign has not consented to be sued, and has expressly declared that no injunction may issue, the sovereign will not permit an unconscionable wrong. In determining whether one branch of the sovereign should protect the threatened action of another branch of the sovereign, these questions become material:

(1) Will the threatened action result in the ruin of the citizen? It was found as a fact in this case that it would.

(2) Will the orderly collection of revenue be disturbed? As an example, from the data available to us, it appears that the Social Security taxes levied against respondent for the year 1953 constituted .0000014% of the total social taxes collected during 1953.¹³

(3) Was the assessment of the taxes probably illegal? Not long before the bill for injunction in this case was submitted to the lower Court, that judge had presided in the anti-trust case against the fishermen's union. When this case came on before him, the government did not resist the issuance of the injunction. As in *Miller v. Nut Margarine*, a development of the factual issues resulted in the conclusion that the plaintiff did not in fact owe the taxes assessed.

¹³ The levy of Social Taxes for the year 1953 was \$6497.00. (R. p. 5, Exhibit "A" to Complaint). The total social security taxes collected in 1953 were \$4,589,230.00. Bureau of Old-Age Survivors Insurance, Social Security Administration, Department of Health, Education and Welfare. It is reasonable to assume that the percentage did not materially increase during the years 1954 and 1955.

(4) Did the respondent have available a legal remedy? We have demonstrated in our fourth proposition that the answer to this is: No.

From this we conclude and submit that if the facts and circumstances in this case did not develop precisely as they did in *Miller*, still the exception to the no injunction statute which *Miller* represents was and is broad enough to permit the Court to enjoin the government from committing an unconscionable wrong.

VI.

The Plaintiff Was Not a Taxpayer.

Throughout the government's brief the respondent is referred to as the taxpayer in terms of the Social Security and unemployment compensation statutes. When we take issue of this characterization of the respondent, it is more than a quibble. From the very moment the investigation commenced leading to the imposition of a crippling assessment, the respondent has denied that it was a taxpayer in terms of the subject statutes. In this regard, as has been said before, respondent was in exactly the same position as was the Nut Margarine Company in the *Nut Margarine* case.

What motivated the Collector of Internal Revenue to impose the assessment we do not know, but we do know that his conclusions ran contrary to the sovereign's contention in *Gulf Coast Shrimpers and Oystermen's Assn. v. U. S.*, and again to that extent the respondent and the plaintiff in *Miller v. Nut Margarine* were in the same position.

Finally, the government does not argue to this Court that conclusions of the trial Court with respect to the relationship were erroneous.

DISCUSSION OF AUTHORITY.

(1) Respondent's Authority:

From the foregoing argument we submit that the respondent, a valid, going concern, engaged in the business of leasing boats, and acquiring raw seafood products, was never considered by the government to be the employer of the men working the boats; that the government in the anti-trust case took the position that by and large the fishermen were not the employees of the companies to which they sold their product; that when this case was initiated, the government did not resist the issuance of the injunction, which action was consistent with its action in the anti-trust case; that the payment of the assessment would have wrecked the corporation, which had no plain, adequate or speedy remedy at law. Finally, the delay in the trial of the case was caused by the government, and the respondent was not a taxpayer.

We believe that those facts and circumstances are sufficient to bring this case within the rule of *Miller v. Nut Margarine Company*. The rationale of the *Miller* case has been applied in controversies involving Social Security and unemployment taxes, the payment of which would have ruined the plaintiffs. See *Midwest Haulers v. Brady*, 128 F. (2d) 496 (C. C. 6th), and *John M. Hurst & Co. v. Gentch*, 133 Fed. (2d) 247 (C. C. 6th).¹⁴

¹⁴ In both cases the plaintiff sought and obtained an injunction against the collector, enjoining him from collecting FICA and FUTA

From a careful reading of *Kaus v. Huston*, 120 F. (2d) 183, it appears that the assessment was only \$1,150.53, and that the payment thereof would have merely worked a hardship on the plaintiff. He further contended that if it were judicially determined that he was liable for the subject taxes, his business would be ruined. On that basis the lower Court and Court of Appeals were justified in concluding that the plaintiff was merely a taxpayer resisting payment of taxes which he believed he did not owe. Two of the vital requirements of *Miller* were not present: (1) He had a remedy at law, and (2) the imposition of the assessment was merely a hardship. Neither of those were present in *Miller* nor in this case. (For a full collection of the cases involving injunctive relief see 65 A. L. R. (2d) 550.)

(2) **Petitioner's Authority:**

The majority in *Allen v. Regents*, 304 U. S. 439, cited by the government did not believe that the proper remedy for the contesting an assessment or collection was an action for recovery for the payment of the tax, for the majority expressly held that the complaint stated a cause of action, permitting an injunction to issue. The Court went on to hold that the tax being the subject of the suit was not an unconstitutional burden on interstate commerce.

Bull v. U. S., 295 U. S. 247, and *State Railroad Tax Cases*, 92 U. S. 575; *Phillips v. Commissioner*, 283

taxes. In *Brady* the taxpayer owed some of those taxes and the suit was brought for the purpose of enjoining the collection of additional taxes.

U. S. 589, and *Flora v. U. S.*, *supra*, are presumably cited to call attention to the expressions contained therein that the government has adopted a pay now, sue later policy. The same can be said of *Cheotham v. U. S.*, 92 U. S. 85, wherein the Court discussed at length the reasonableness of the taxpayer's remedies.

In *Enochs v. Green*, 270 F. (2d) 558 (C. A. 5th), the taxpayer probably owed some Social Security taxes, which fact alone distinguishes that case from the present one.

The actual holding in *Homan Mfg. Co. v. Long*, 242 F. (2d) 653, was that summary judgment did not lie in the particular case. The Court reached no conclusion with respect to whether the facts before evidenced "administrative caprice."

Snyder v. Marks, 109 U. S. 189, cited by the government as defining the word "tax," is distinguishable from *Miller v. Nut Margarine* and this case on the simple ground that in both the parties were not mere errors in the assessment. In this case and in *Miller* there was contended an absolute immunity from all or any part of the assessment, which contention was subsequently borne out when the facts were developed.

Missouri Valley Intercollegiate Athletic Assn. v. Bookwalter, 276 F. (2d) 365, and the remaining cases cited in footnote 12, page 22, of the government's brief, are clearly distinguishable. In *Bookwalter*, the Court said

"... in reality the dispute is solely over the amount of the tax due, which issue cannot justify the exercise of equity jurisdiction."

Mensik v. Long, 261 Fed. 45 (C. A. 7), involved income taxes and the correctness of the assessment. The plaintiff charged the collector with error in including certain items in his income. There was a probability that the plaintiff might be liable for all of the assessment, part of it or none of it. In *Miller* and this case, plaintiffs contended that the subject tax did not apply to them.

The *Clegg* cases cited in footnote 13, page 24, of the government's brief, have not been reported, and we do not know what they decided. We do know that the National Labor Relations Board has resolved factual issues similar to those presented to the trial Court in a way which is consonant with the decision reached by the trial judge.¹⁵

CONCLUSION.

The government recognizes that *Miller v. Nut Margarine* represents an exception to Section 7421(a) and does not argue that this exception should be judicially erased. The vital equitable considerations outlined in *Miller* were found to be present in this case. The gov-

¹⁵ See: NLRB decisions cited in N. 3, opinion of court of appeals, R. p. 288.

ernment does not contend that those findings were clearly erroneous. Therefore, this case should be affirmed.

Respectfully submitted,

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CERTIFICATE.

I hereby certify that a copy of the foregoing brief for the respondent has been served on the Solicitor General, Department of Justice, Washington 25, D. C., by air mail, postage prepaid, this _____ day of April, 1962.